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A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in Copyright

David E. Shipley¹

INTRODUCTION

I am in my late 50s and have been a law professor for over thirty years.² I hold a named professorship and I have served as dean at three well-regarded public law schools over a thirteen-year period in my academic career. I have chaired many ABA accreditation site inspections. I spend a great deal of time preparing for class, and I started writing articles again in 2003 after my most recent tour as dean ended. I am a fairly serious guy, but I have this statement taped to my office wall: “You can only be young once, but you can be immature forever.”³ I love this saying for a couple of reasons.

First, I have an academic interest in this proposition because there are some good copyright cases on whether short phrases like “Repeat Threepart” and “You’ve Got to Stand for Something” can be protected by copyright.⁴ Is the phrase *de minimis* in terms of the requisite originality? Are there only a few ways to express this particular idea about getting old but remaining young at heart (my spin on it) so that the merger doctrine applies

1 Thomas R.R. Cobb Professor, University of Georgia School of Law. B.A. 1972, Oberlin College; J.D. 1975, University of Chicago Law School. Dean, University of Mississippi School of Law, 1990-1993; Dean, University of Kentucky College of Law, 1993-1998; Dean, University of Georgia School of Law, 1998-2003.

2 I started teaching as a Visiting Assistant Professor at the University of South Carolina two years out of law school at the ripe old age of twenty-six, and turned twenty-seven during my first semester in the classroom. I doubt I would be hired today with such minimal experience.

3 Anderson’s Axiom, Murphy’s Law 2008 Calendar, Wednesday, January 30 (on file with author).

4 *Dobson v. NBA Props., Inc.*, No. 98 Civ. 7696, 1999 U.S. Dist. LEXIS 1834, at *5 (S.D.N.Y. Feb. 19, 1999) (“Repeat Threepart” in reference to Michael Jordan and the Chicago Bulls denied protection); *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 155 F.3d 140, 144 (2d Cir. 1999) (phrase not entitled to protection because originality is *de minimis*); see U.S. COPYRIGHT OFFICE, COPYRIGHT PROTECTION NOT AVAILABLE FOR NAMES, TITLES, OR SHORT PHRASES, COPYRIGHT CIRCULAR No. 34-0206 (2006); U.S. COPYRIGHT OFFICE, II COMPENDIUM OF COPYRIGHT OFFICE PRACTICES, § 202.02(i) (1984) (stating that “[w]ords and short phrases such as names, titles, and slogans are not copyrightable”).

to deny or severely limit protection?⁵ This maxim inspired a short question on my spring 2008 Copyright exam: in essence, is it copyrightable?

Another reason I like this axiom is because it describes me. You can ask my wife of twenty-nine years or our daughter, a lawyer practicing in Atlanta. They will say I have an immature, juvenile sense of humor. I still laugh at the same kinds of jokes and gags that I loved to share with my late mother when I was ten years old! My mom had four brothers, so she heard plenty of bad jokes growing up, but she still would say to me, "Oh David! That was just awful." That rebuke never stopped me, because she often laughed when she scolded me about telling a terrible joke.

Given my juvenile sense of humor, you can imagine my pleasure and laughter when I read the opinion in *JCW Investments, Inc. v. Novelty, Inc.*⁶ by the Honorable Diane Wood, U.S. Court of Appeals for the Seventh Circuit. Writing for a unanimous three-judge panel she states, "Somewhat to our surprise, it turns out that there is a niche market for farting dolls, and it is quite lucrative."⁷ Upon reading this statement my reaction was "Tickle Me Elmo" is one thing, but a farting doll—that is something else! The case, a copyright infringement suit between the plaintiff's plush toy with sound, named "Pull My Finger Fred," and the defendant's plush doll with sound, called "Fartman," evidences the profound influence that Justice Oliver Wendell Holmes still has on American copyright law. I am not kidding.

You might be asking, how can a plush doll named Fred,⁸ who says things like "Did somebody step on a duck?" or "Silent but deadly," while simultaneously making a sound resembling flatulence when you press a red sticker on the protruding finger on his right hand,⁹ have any sort of connection with the revered Justice Holmes? Here is how. Some of the most important statements in our nation's rich copyright jurisprudence were written by Justice Holmes over a century ago in *Bleistein v. Donaldson Lithographing Co.*,¹⁰ a case holding that circus posters were entitled to

5 See CRAIG JOYCE ET AL., COPYRIGHT LAW 123 (7th ed. 2006) (discussing *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678-79 (1st Cir. 1967), where the plaintiff's sweepstakes rule was not copyrightable because its "expression was tied too closely to the underlying idea").

6 *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910 (7th Cir. 2007).

7 *Id.* at 913. Also, a blog was the source of inspiration for this Article. See Jokes and Copyright, <http://williampatry.blogspot.com/2008/01/jokes-and-copyright.html> (Jan. 29, 2008, 09:48 EST).

8 See *JCW Invs., Inc. v. Novelty, Inc.*, 289 F. Supp. 2d 1023, 1028 (N.D. Ill. 2003), *aff'd*, 482 F.3d 910 (7th Cir. 2007) ("Fred is a plush toy figure of a smiling, black haired, balding, Caucasian man in a white tank top, blue pants, and brown shoes with black bottoms, sitting in a green chair. When Fred is activated by pinching a red sticker marked 'Press Here' on the protruding finger of his right hand, Fred emits flatulence-like sounds, his chair vibrates, and he jokes about the sound he just made.").

9 *Id.*

10 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

copyright protection.

In *Bleistein*, Justice Holmes stated that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [writings, illustrations, music and other forms of expression] outside of the narrowest and most obvious limits.”¹¹ This announced what has been called the principle of “aesthetic non-discrimination.”¹²

The vitality of this principle is acknowledged in the legislative history of the Copyright Act of 1976.¹³ The House Report states, “The phrase ‘original works of authorship’” in section 102(a) of the Copyright Act¹⁴ was “intended to incorporate without change the standard of originality established by the courts under the [1909 Act]. *This standard does not include requirements of novelty, ingenuity, or [a]esthetic merit . . .*”¹⁵ In other words, a velvet portrait of Elvis, purchased at a flea market, is as much entitled to copyright protection as a numbered and signed photograph by Annie Leibovitz purchased at a high-end gallery.

Justice Holmes also stated in *Bleistein* that “[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.”¹⁶ This statement from *Bleistein* established the standard for copyrightability. The law requires only “‘a low degree of originality and artistic or literary merit’ to obtain copyright” protection.¹⁷

The Supreme Court’s extended discussion of the originality requirement in *Feist Publications, Inc. v. Rural Telephone Services Co., Inc.*,¹⁸ decided almost ninety years after *Bleistein*, while putting to rest the “sweat-of-the-brow” theory of protection,¹⁹ may have raised the threshold for protection ever so slightly. The Court said that it was not enough for a work to be created independently; it also has to evidence “at least some minimal degree of creativity.”²⁰ Still, the originality requirement is not a particularly stringent

¹¹ *Id.* at 251.

¹² JOYCE ET AL., *supra* note 5, at 97 n.4.

¹³ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

¹⁴ 17 U.S.C. § 102(a) (2006) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”).

¹⁵ H.R. REP. NO. 94-1476, at 51 (1976) (emphasis added).

¹⁶ *Bleistein*, 188 U.S. at 250.

¹⁷ Dianne Leenheer Zimmerman, *The Story of Bleistein v. Donaldson Lithographing Company: Originality as a Vehicle for Copyright Inclusivity*, in INTELLECTUAL PROPERTY STORIES 77, 101-02 (Jane Ginsburg & Rochelle Dreyfuss eds., 2006) (citing *Ansehl v. Puritan Pharmaceutical Co.*, 61 F.2d 131, 136 (8th Cir. 1932)).

¹⁸ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

¹⁹ *Id.* at 352-54.

²⁰ *Id.* at 345.

standard.²¹ It is easy to satisfy.

"Pull My Finger Fred," and many other decisions involving bad jokes, sick parodies, and subject matter that could be regarded as in bad taste, disgusting or even obscene, show that the Holmes' principle of aesthetic non-discrimination has, for the most part, been taken seriously by the courts.²² This principle is often tested in cases where a defendant uses a popular copyrighted work without permission in a way that is disgusting or offensive to the copyright owner. For example, a photographer posed nude Barbie dolls in suggestive positions with common kitchen appliances and marketed his photographs as art.²³ Mattel sued for infringement and the photographer was successful in arguing that his photographs were fair use parodies of Barbie.²⁴ The judges who decided this case did not let their opinions on whether the defendant's photos of Barbie were in bad taste color their fair use analysis.²⁵ Not all courts, however, have been able to maintain this kind of objectivity, so Holmes' principle is sometimes at risk when courts have to decide whether an offensive or disgusting use of a protected work is a parody and fair use.²⁶

The cases reviewed in Section I of this Article show that subject matter one might label as offensive or repulsive is ordinarily copyrightable. It is rare for an offensive work to fall within those "narrow[] and most obvious limits" and be held unprotectable. Moreover, as discussed in Section II, many a defendant's use of another's protected work in an offensive or even disgusting manner has been permitted as a parody by application of our robust fair use defense.²⁷ For the most part, courts have applied the fair use doctrine in accordance with Holmes' warning about not judging the worth of particular works.²⁸ Although most federal courts heed his

21 See *id.* at 358; Zimmerman, *supra* note 17, at 105-08 (discussing the *Feist* decision's impact on *Bleistein*); see also David E. Shipley, *Thin But Not Anorexic: Copyright Protection of Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91, 98-99 (2007).

22 Cf. JOYCE ET AL., *supra* note 5, at 97 n.4 (asking whether it is possible to observe this prescription faithfully).

23 Mattel Inc. v. Walking Mountain Prods., No. CV998543RSWL, 2001 WL 929923 (C.D. Cal. 2001), *aff'd*, 353 F.3d 792, 812 (9th Cir. 2003); see *infra* text and notes at notes 254 to 264.

24 Mattel Inc. v. Walking Mountain Prods., No. CV998543RSWL, 2001 WL 929923 (C.D. Cal. 2001), *aff'd*, 353 F.3d 792, 812 (9th Cir. 2003); see *infra* text and notes at notes 254 to 264.

25 See Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003).

26 See *infra* notes 297-325 and accompanying text.

27 See 17 U.S.C. § 107 (2006) (codifying the fair use defense).

28 Cf. Paul Tager Lehr, Note, *The Fair-Use Doctrine Before and After "Pretty Woman's" Unworkable Framework: The Adjustable Tool for Censoring Distasteful Parody*, 46 FLA. L. REV. 443, 460 (1994) (the flexibility of fair use analysis enables courts to censor parodies found to be obscene and distasteful). Many of the cases discussed in this Article also raise issues of trademark and trade dress infringement. This Article is not, however, addressing arguably immoral, obscene, and distasteful materials in the context of trademark law. The questions are much the same. Can a word, name, symbol, etc., be protected as a trademark if it is obscene or immoral? What rights do the owners of trademarks have against parodies of their

admonition, the discussion in Section III explains that there is still a risk that a court's perception of the worth or merit of an infringing work will affect the ultimate decision. In particular, there is risk of a court failing to heed Holmes' warning when it has to decide, in accordance with the framework for fair use analysis announced by the Supreme Court in *Campbell v. Acuff-Rose Music*,²⁹ whether a challenged spoof or take-off on a copyrighted work qualifies as a parody by targeting or by commenting on that protected work.³⁰ Like several other commentators, I am troubled by the comment on the original or target requirement,³¹ and I conclude in Section IV by contending that courts should be more willing to recognize satire as fair use. Criticism and comment are listed as acceptable uses in the preamble to the Copyright Act's fair use provision,³² and there is no doubt that a writer's or an artist's use of another author's familiar copyrighted material to make a satirical comment or critique about society can present a forceful message.³³ Those satiric messages should not be suppressed out

marks? Is a fair use defense against alleged trademark infringement as robust as copyright law's fair use doctrine? For instance, can the Boston Red Sox block the registration of the mark "Sex Rod" for clothing because it will disparage the famed Red Sox team mark? *See* Boston Red Sox Baseball Club v. Sherman, Opposition No. 91172268, at 3 (T.T.A.B. Sept. 9, 2008). There is a considerable amount of scholarship on these issues. *See, e.g.*, 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:153 (4th ed. 2006); Jacqueline Lipton, *Commerce Versus Commentary: Gripe Sites, Parody, and the First Amendment in Cyberspace*, 84 WASH. U. L.R. 1327, 1328 (2006); Tyler Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 620-33 (1998); Robert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1079-81 (1986).

²⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-78 (1994).

³⁰ *Id.* at 580. Justice Kennedy called this the "targeting" requirement in his concurrence. *Id.* at 598 (Kennedy, J., concurring); *cf.* Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 1, 6 (1987) (noting that "[i]t is probably impossible to rule in these cases . . . without assuming some literary values").

³¹ *See, e.g.*, Roger L. Zissu, *Funny is Fair: The Case for According Increased Value to Humor in Copyright Fair Use Analysis*, 55 J. COPYRIGHT SOC'Y U.S.A. 393, 393-94 (2008); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 122 (1996); Nicholas Suzor, *Where the Bloody Hell Does Parody Fit in Australian Copyright Law?*, 13 MEDIA & ARTS L. REV. 218, 220-33 (2009); Julie Alane Arthur, *Jeff Koons: Artist or Thief?*, 41 COPYRIGHT L. SYMP. (ASCAP) 99, 128-32 (1992). *But see* Bisceglia, *supra* note 30, at 23-29 (explaining why parody needs to criticize the source text but acknowledging that courts still have to decide difficult questions about how the parody and the source text relate).

³² 17 U.S.C. § 107 (2006) ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright."); *see* Arthur, *supra* note 31, at 129-30.

³³ *Cf.* Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1910 (2000) (discussing the potency of the satirical message in the "Air Pirates" comics due to the defendants' unauthorized use of the iconic Disney cartoon characters).

of fear of liability for copyright infringement. If sued for infringement, a satirist should be entitled to a thorough analysis of his or her fair use defense even though the satiric critique or comment is not directed at the plaintiff's familiar work but at society's follies and foibles.

I. COPYRIGHT PROTECTION FOR BAD JOKES AND OTHER QUESTIONABLE SUBJECT MATTER

Before considering the copyrightability of both good and bad jokes and other materials people might find offensive or repulsive, it is important to set forth the basics of copyright protection. The statute provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."³⁴ The key words are "original works of authorship," and this is where the Supreme Court's decision in *Feist* becomes so important.

The facts of *Feist* were simple. Rural Telephone published a standard white pages telephone directory with names, numbers and addresses listed in alphabetical order and Feist, a publisher of competing directories, copied about 1300 of Rural's names and numbers.³⁵ The trial court found infringement and the Tenth Circuit Court of Appeals affirmed, but the Supreme Court reversed,³⁶ holding that Rural's copyright did not protect the alphabetically-listed names and numbers Feist copied. Most importantly, the Court declared that originality is a constitutional requirement for copyright.³⁷

The Court defined originality as independent creation and a modest degree of creativity.³⁸ The requisite level of creativity is low, and most works will satisfy this standard, since they will possess some creative spark. It does not matter that a work is crude or humble or obvious. Novelty is not required.³⁹ The Court defined creativity by negative example, explaining that a work might not pass muster if it was mechanical, routine,

³⁴ 17 U.S.C. § 102(a) (2006).

³⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344 (1991).

³⁶ *Id.* at 363.

³⁷ *Id.* at 346.

³⁸ *Id.* (citing *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

³⁹ *Id.* at 345. *Feist's* requirements are consistent with the requirements of the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade Related Aspects of Intellectual Property. Both use the term "intellectual creation" as a requirement. This demands more than a work simply originate with the author. It includes, if not creativity, then at least some intellectual effort. Daniel Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y USA 949, 971 n.150 (2002); Shipley, *supra* note 21, at 95-96.

commonplace, typical, garden-variety, obvious, inevitable, or dictated by law.⁴⁰

What does this mean in practice for jokes and gags? Copyright Office regulations provide that “[w]ords and short phrases, such as names, titles and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listings of ingredients or contents” are not registrable.⁴¹ Courts have not, however, always followed this regulation to the letter and sometimes have found relatively short phrases to be copyrightable.⁴² Predicting outcomes is difficult. A section in Compendium II of Copyright Practices addresses comedy sketches and states that “[j]okes and other comedy routines may be registered if they contain at least a certain minimum amount of original expression in tangible form. Short quips and slang expressions consisting of no more than short phrases are not registrable.”⁴³ When these two statements from the Copyright Office are combined, it is reasonable to conclude that the copyrightability of gags and jokes should be judged according to the originality standard just like any other material.⁴⁴ Some jokes are old and in the public domain, or stock situations, or too simple and obvious. Moreover, the idea/expression dichotomy, the merger doctrine and *scenes a faire* limit protection.⁴⁵ Still, many jokes have no difficulty satisfying the originality standard.⁴⁶ Case law is, however, sparse even though joke stealing occurs and is a concern among comedians. Commentators explain that comedians do not regard copyright as an effective way to protect their works and that there is an informal system of norms for self-regulation.⁴⁷

40 Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 LAW & CONTEMP. PROBS. 3, 16 (1992).

41 37 C.F.R. § 202.1(a) (2008); see, e.g., *Douglas v. Osteen*, 560 F. Supp. 2d 362, 367 (E.D. Pa. 2008) (plaintiff alleged that defendant’s book of Bible stories and motivational prayers and anecdotes infringed his book but the court granted defendant’s motion to dismiss, noting that there is no copyright protection for the titles of books, short phrases or biblical stories which are in the public domain or use the same literary style citing, among other things, this Copyright Office regulation).

42 See 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 333-35 (1994); see also Richard Stimm, *I May Not Be Totally Perfect but Parts of Me Are Excellent: Copyright Protection for Short Phrases*, STANFORD COPYRIGHT AND FAIR USE, http://fairuse.stanford.edu/commentary_and_analysis/2003_09_stim.html (last visited Jan. 15, 2010).

43 II COMPENDIUM, *supra* note 4, § 420.02.

44 See Jokes and Copyright, *supra* note 7; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.13 (2009).

45 See Allen D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111, 116 (1998). This author uses “knock, knock” jokes and “how many ____ does it take” jokes as examples of the merger of ideas and expressions in the context of jokes. *Id.* at 118.

46 See 1 NIMMER & NIMMER, *supra* note 44, at § 2.13. But see Madison, *supra* note 45, at 133-34.

47 See Gayle Herman, *The Copyrightability of Jokes: “Take My Registration Deposit . . . Please!”* 6 HASTINGS COMM. & ENT. L.J. 391, 393, 400 (1983) (asserting that self-imposed good faith

In *Hoffman v. LeTraunik*, decided in 1913, a New York federal district court suggested that original jokes and monologues could be protected by copyright while ruling against the plaintiff's infringement claim because his material was not original.⁴⁸ In 1947, the Ninth Circuit Court of Appeals ruled in the comedian Harold Lloyd's favor when it found that fifty-seven comedy scenes from one of his movies had been copied and infringed.⁴⁹ The court held that Lloyd's scenes were copyrightable but simultaneously stressed the substantiality of the taking. Twenty percent of the plaintiff's movie was appropriated,⁵⁰ and the scenes were critical to the story and not merely "comedic accretion,' isolated 'gags,' or 'stage business.'" ⁵¹ These decisions are old but both suggest that some jokes might be copyrightable.⁵²

The leading decision on the protection of jokes involves Jeff Foxworthy, a comedian known for his redneck humor, especially his "you might be a redneck if . . ." jokes. For example, "You might be a redneck if . . . you've ever financed a tattoo," and "You might be a redneck if . . . your dad walks you to school because you're in the same grade."⁵³ He learned in 1994 that Custom Tees was selling T-shirts bearing his jokes in a slightly different format. For example, the copy on one shirt read, "If you've ever financed a tattoo . . . you might be a redneck."⁵⁴ Foxworthy's representatives told Custom Tees that the phrases on the shirts violated Foxworthy's copyrights and/or trademarks, so Custom Tees altered the copy to read as follows: "When you learn to drive in a car where you were conceived . . . you ain't nothin' but a redneck." Foxworthy eventually sued and one of Custom Tees' defenses to the copyright infringement claim was that the jokes were not original to Foxworthy and he could not claim authorship in them.⁵⁵

Foxworthy had acknowledged in the Foreword of his book, *Red Ain't*

practices are not sufficient and that the most desirable form of protection is under copyright); Madison, *supra* note 45, at 113-14; Dotan Oliar & Christopher Sprigman, *The Emergence of Intellectual Property Norms in Stand-Up Comedy*, 94 VA. L. REV. 1787, 1790-91 (2008); cf. Andrew Greengrass, *Take My Joke . . . Please!* Foxworthy v. Custom Tees and the Prospects for Ownership of Comedy, 21 COLUM.-VLA J.L. & ARTS 273, 273-74 (1997) (arguing for greater protection of the "comedy nugget" under a trademark law-based theory).

48 *Hoffman v. LeTraunik*, 209 F. 375, 379 (N.D.N.Y. 1913); see Herman, *supra* note 47, at 401; Madison, *supra* note 45, at 125-26.

49 *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947).

50 *Id.* at 360.

51 Herman, *supra* note 47, at 401-02 (citing *Lloyd*, 162 F.2d at 363).

52 Herman, *supra* note 47, at 403; Greengrass *supra* note 47, at 278.

53 *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1204 (N.D. Ga. 1995).

54 *Id.*

55 *Id.* at 1217. The defendants also argued that plaintiff's book of redneck jokes was copyrighted as a compilation and therefore the registration did not cover the individual jokes. The court disagreed, saying that *Feist* made clear that copyright in a compilation extended to an author's original contributions, not just his or her selection and arrangement of materials. The materials included in a compilation can be copyrightable. *Id.* at 1217-18.

Dead, that he gets new examples of ‘redneckisms’ from many sources, but he testified that most of his joke ideas were original to him. The court stated, “More important . . . even when he receives an idea from another person, it is plaintiff who takes the idea and gives it expression in the form it appears in his books.”⁵⁶ After explaining that facts and ideas are not protected by copyright, and that copyright inheres in the expression used by an author,⁵⁷ the court said, “[T]wo entertainers can tell the same joke, but neither entertainer can use the other’s combination of words.”⁵⁸ As for Foxworthy’s creativity, the court turned to his testimony:

[W]e all have the same bowl of words to work with, and the whole trick is to take the smallest amount of words and put them in the proper order. You know, I’ve sat backstage with Jay Leno or Gary Shandling and sometimes for ten or fifteen minutes argued about a particular one line in a joke, which word should go where, should you delete this, which word should go to the end of the joke, and so that’s why it changes. I mean, it’s to get the maximum laugh from, you know, the shortest amount of material.

Q. How important is the particular expression of the joke versus the underlying idea of the joke?

. . . .

A. Well, I mean the idea is key in coming up with the wording. You need—the idea comes first and then you play with it to get the wording correct.⁵⁹

The court concluded that the jokes copied by Custom Tees were Foxworthy’s own expression, and that his jokes evidenced the requisite modicum of intellectual labor so as to be protected by copyright.⁶⁰ Foxworthy established likelihood of success on the merits of his copyright infringement claim.⁶¹ The opinion did not mention the Copyright Office’s regulation that states short phrases are not registrable, nor did the court discuss the Compendium II statement that simple jokes and quips are not registrable.⁶² I doubt the court would have been troubled or felt restricted

⁵⁶ *Id.* at 1218 (referencing Foxworthy’s testimony).

⁵⁷ *Id.* at 1219 (“As the *Feist* Court put it, ‘others may copy the underlying facts from the publication, but not the precise words used to present them.’” (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991))).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*; Oliar & Sprigman, *supra* note 47, at 1806 (noting that Foxworthy did not claim copyright protection for the first part of his jokes—“You might be a redneck if . . .,” and in holding that he was likely to prevail on his infringement claim, the court implicitly found that defendant’s reordering of Foxworthy’s jokes did not change his protected expression enough to escape liability).

⁶² See *supra* notes 41–44 and accompanying text.

by either policy given its explanation as to why Foxworthy's redneck jokes were original to him and evidenced sufficient creativity so as to be protected by copyright.⁶³

If most "You might be a redneck if . . ." jokes are copyrightable, then what does not pass muster under *Bleistein* and *Feist*? What about statements like, "Silent but deadly" or "Pull my finger" followed by a flatulence-like sound? My gut response is that both are in the public domain. With regard to the former, how else can that inaudible breaking of wind be described, and as for the latter, it is an old joke that has been around for years as explained by the trial judge in the *Pull My Finger Fred* case. He stated that the gag "did not originate with the plaintiff or the defendant. Neither did the sayings 'did somebody step on a duck' nor 'silent but deadly.'"⁶⁴ In fact, according to the judge:

[R]ecorded history of the "pull-my-finger" joke appeared as early as 1887 in Emile Zola's book *The Earth*. A reference to a doll performing the "pull my finger" gag surfaced in 1997 when radio personalities Bob and Tom released an album "FUNHOUSE," which contained a previously broadcast comedy sketch entitled "Pull My Finger Charlie."⁶⁵

The defendant, whose doll uttered the same lines as plaintiff's doll, tried to extrapolate on the principle that these flatulence gags were in the public domain by making a *scenes a faire* argument,⁶⁶ asserting it is "'standard' to stereotype a character that finds humor in farting and makes joking about farting as having a low socioeconomic status" and citing authority for the proposition that fart jokes have long been popular "'among the lower classes' and 'poor people.'"⁶⁷ The defendant was arguing, in essence, that all the elements it took from the plaintiff's doll, both the flatulence jokes, as well as the overall appearance, were not protected because of the *scenes a faire* doctrine.

63 *But see* Olliar & Sprigman, *supra* note 47, at 1807 n.51 ("Perhaps the . . . court should have taken the Copyright Office's advice and refused to recognize Foxworthy's copyright claim in his punchlines—each of which is a short phrase."); Madison, *supra* note 45, at 126-28 (criticizing the analysis in *Foxworthy*). *See generally* Greengrass, *supra* note 47, at 274-75 (arguing that a comedian's material should be protected in order to provide an incentive to promote the useful art of comedy).

64 *JCW Invs., Inc. v. Novelty, Inc.*, 289 F. Supp. 2d 1023, 1030 (2003), *aff'd*, 482 F.3d 910 (7th Cir. 2007).

65 *Id.*

66 *Scenes a faire* are defined as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.* 672 F.2d 607, 616 (7th Cir. 1982) (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

67 *JCW Invs.*, 289 F. Supp. 2d at 1037-38 (citing JIM DAWSON, WHO CUT THE CHEESE? A CULTURAL HISTORY OF THE FART (1999)).

The trial court and the Seventh Circuit Court of Appeals disagreed with defendant's contentions. The trial court said that some of defendant's arguments were "more than a bit insulting and condescending,"⁶⁸ and that the attempt to narrow the scope the protected expression in the appearance of the plaintiff's doll was without merit.⁶⁹ The Seventh Circuit, in affirming the grant of summary judgment for the plaintiff said, "[N]o objective person would find these dolls to be more than minimally distinguishable. To the contrary, they are substantially similar. . . . Indeed, the dolls are so similar that an inference of copying could be drawn even without the evidence of access."⁷⁰ The court continued:

It is not the idea of a farting, crude man that is protected, but this particular embodiment of that concept. Novelty [the defendant] could have created another plush doll of a middle-aged farting man that would seem nothing like Fred. He could, for example, have a blond mullet and wear flannel, have a nose that is drawn on rather than protruding substantially from the rest of the head, be standing rather than ensconced in an armchair, and be wearing shorts rather than blue pants.⁷¹

In the end, it did not matter whether the short phrases spoken by the plaintiff's doll might have been unprotectible. The validity of the copyright on the plaintiff's Pull My Finger Fred doll was not questioned, and the Fartman doll was substantially similar to it.⁷²

In contrast, a copyright infringement claim by the makers of a novelty device called "Cajun in Your Pocket" was thwarted by the originality requirement. The plaintiff's device was a hand-held, play-back toy that performed one of six Cajun phrases when a particular button was pushed. Two of these phrases—"You gotta suck da head on dem der crawfish," and "Oo, cher, look like you gotta Cajun in you pocket"—were included in a rap song called "Shake Ya Ass" which was recorded by the rap artist Mystikal and distributed by Zomba Recording.⁷³ The defendants argued that the copied

⁶⁸ *Id.* at 1038.

⁶⁹ *Id.* at 1037.

⁷⁰ *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 916 (7th Cir. 2007).

⁷¹ *Id.* at 917. Fartman was more like Fred than the plaintiff's other farting dolls resembled Fred. For example, plaintiff's Frankie doll—Fred's blonde, motorcycle riding cousin—was considerably different from Fred. *Id.* at 913, 917.

⁷² *Id.* at 915. Defendant did not argue that plaintiff lacked a valid copyright. "Indeed, Fred is a far cry from a noncreative compilation of facts such as the telephone book in *Feist*. Here, we have a creative doll There is no doubt that there is a valid copyright." *Id.*

⁷³ *Emanation Inc. v. Zomba Recording, Inc.*, 72 F.App'x 187, 187-88 (5th Cir. 2003) (per curiam) (unpublished decision); see *Trivial Changes to Common Cajun Phrases Fail to Satisfy Originality Requirement*, 66 PAT. TRADEMARK & COPYRIGHT J. (BNA) 515, 515-16 (AUG. 29, 2003) (discussing *Emanation*). The four other phrases were "AIEEEE," "We gon pass a good time, yeah, cher," "Oo, I love you like a pig loves corn," and "Laissez les bons temps rouler."

phrases were not sufficiently original for copyright protection, and the trial court agreed, granting summary judgment for the defendants.⁷⁴ The Fifth Circuit affirmed.⁷⁵ The trivial changes plaintiff made to these common Cajun sayings were not sufficient for copyright protection.⁷⁶ Adding a word like “yeah” and recording the common phrases in a typical Cajun dialect did not meet *Feist*’s requirement that there be at least a minimal degree of creativity.⁷⁷

The rapper Lil’ Joe Wein encountered similar problems when he claimed that the song “In Da Club” by the rapper 50 Cent infringed his rap song, “Its Your Birthday.”⁷⁸ The trial court determined, after extracting the non-protectible elements from the two songs, that there were no similarities but for the specific phrase, “Go ____, it’s your birthday.”⁷⁹ The composer of plaintiff’s song admitted that he had not created this phrase on his own, but had borrowed it from popular hip-hop chants.⁸⁰ Moreover, there was considerable evidence that: 1) the phrase was used many years earlier in a song by the rapper Luther Campbell; 2) that the chant “Go ____, it’s your birthday” was used and heard at clubs before Campbell composed his song; 3) that the phrase was used in the movie *Who’s the Man* starring Dr. Dre and Ed Lover (MTV personalities at the time); and 4) that the lyrics “go, go, go, go” and “Go [name],” and “it’s your birthday” were used in a song called “Bounce” by the Incredible Crew.⁸¹ The trial court concluded that the “birthday” chant “was a common, unoriginal, and noncopyrightable element of the song” and, since there were no other similarities between the two works, it granted summary judgment for the defendants.⁸² The Eleventh Circuit affirmed in a per curiam opinion.⁸³

The trial court’s opinion in the Lil’ Joe Wein/50 Cent litigation included the following quote from an expert’s report:

Emanation, 72 F. App’x at 187.

⁷⁴ *Emanation*, 72 F. App’x at 188.

⁷⁵ *Id.* at 187.

⁷⁶ *Id.* at 191.

⁷⁷ *Id.* The plaintiff’s president argued that the district court erred in ruling that the two sayings were unprotected facts since they made creative changes to the Cajun sayings to satisfy the originality requirement. *Id.* at 191. In ruling against the plaintiff, the court relied on its decision in *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45 (5th Cir. 1995). *Emanation*, 72 F. App’x at 191.

⁷⁸ Lil’ Joe Wein Music, Inc. v. Jackson, 245 F. App’x 873, 876, 879 (11th Cir. 2007) (per curiam) (unpublished decision).

⁷⁹ *Id.* at 875-76.

⁸⁰ *Id.* at 879.

⁸¹ *Id.* at 878.

⁸² *Id.* at 879-80.

⁸³ *Id.* at 874 (affirming based on the trial court’s “well reasoned and comprehensive opinion”); see Robert W. Clarida & Thomas Kjellberg, *Recent Developments in Copyright*, 56 J. COPYRIGHT Soc’y U.S.A. 67, 101 (2008).

A signature and long-standing feature of live performance rap music is the hip hop chant. The chant is a form of audience engagement staged by the performer (mc, dj or rapper) who provides a familiar phrase or saying, often in call and response format, designed to energize, include, affirm and engage the audience.⁸⁴

In view of this statement, the Copyright Office regulation against registration of short phrases, the creativity requirement, the widespread use of hip-hop chants and similar simple phrases like “Clap your hands now, people clap now”⁸⁵ and “go, go, go shawty,” it is difficult to make a persuasive argument that simple chants and repetitive short phrases satisfy the originality standard. It does not matter whether or not they are in bad taste, offensive, or obscene. Most can be freely borrowed and readily used by other artists.

For example, even though the plaintiff’s evidence of defendant’s access to his R&B, hip-hop song “She Can’t Stand It,” precluded summary judgment on the issue of unauthorized copying, the court concluded that defendants’ R&B, hip hop song “On Our Own” was not substantially similar to plaintiff’s song in large part because:

Each of [defendant] MCA’s experts attributed any similarities between the songs as a result of their being from the same “R & B/hip-hop” genre. . . . [The first expert explained], “[T]he “features [of the two songs] are musical ideas common to the R & B/hip-hop genre or relate to ‘timbres’ or ‘sounds’ (and not the composition of the songs) and do not indicate original musical expression.” [The second expert found that] “[w]hatever common general elements do exist between the two songs stem from the currently popular genre of R & B/hip-hop music to which both compositions belong”⁸⁶

Still, there are cases like *Takeall v. Pepsico, Inc.*, in which the court

84 *Lil’ Joe Wein Music, Inc.*, 245 F. App’x at 878 (Tricia Rose was the expert).

85 In *Jean v. Bug Music, Inc.*, No. 00 CIV 4022(DC), 2002 WL 287786 (S.D.N.Y. 2002) (mem.), the plaintiffs sought a declaratory judgment that their song, “My Love Is Your Love,” made popular in a recording by Whitney Houston, did not infringe the copyright on defendants “The Hand Clapping Song.” The only similarity between the works involved the short phrase “clap your hands now people,” and the court concluded that the phrase was unprotectible because it used common musical and lyrical phrases found in other recordings. *Id.* at *5-6. It lacked originality. *Id.* at *6. The prior art included the biblical phrase “O clap your hand all ye people” in Psalm 47:1 of the Old Testament and many church anthems. *Id.* at *3 (citations omitted). Even if the phrase was copyrightable, the taking was de minimis. *Id.* at *7.

86 *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 946 (8th Cir. 1992). The court quoted from one of the defendants’ experts. *Id.* The plaintiff’s expert admitted it was possible that the defendants’ song was not copied from plaintiff’s song and that he had not investigated hip-hop music. *Id.*

assumed that the pedestrian, but catchy, jingle “You got the right one, Baby, uh-huh!” was copyrightable.⁸⁷ Although it might be seen as being ordinary or in common parlance today, at the time of the litigation it was “not commonly heard . . . among either cultured or uncultured speakers of the American Dialect of the English language.”⁸⁸ Nevertheless, the plaintiff lost on summary judgment because he could not prove that Pepsi, which used a remarkably similar jingle in a very successful advertising campaign, had access to his slogan and copied it.⁸⁹

Before getting into salacious parodies and scatological humor being treated as fair use, it is important to consider whether immoral, obscene, or pornographic material can be protected by copyright. The prevailing view, consistent with *Bleistein*’s principle of aesthetic non-discrimination, is yes.⁹⁰ After all, the defendants in *Bleistein* had argued that one of the plaintiff’s circus posters, depicting ballet dancers in tights, was immoral, but the Supreme Court still held that the posters were copyrightable.⁹¹ Of course, this decision was rendered in 1903, and I am not sure how Justice Holmes would react today to an infringement claim by producers of a triple-X rated, hard-core pornography film, available online, alleging that the copyright in the film had been infringed by unauthorized reproductions and/or public performances. Would he have concluded that the obscene material could not be protected because it did not promote the progress of science?⁹² I leave that question to historians and note that *Bleistein* was

87 *Takeall v. Pepsico, Inc.*, 809 F. Supp. 19, 20-21 (D. Md. 1992), *aff’d* 14 F.3d 596 (4th Cir. 1993).

88 *Id.* at 21. Defendant Pepsi said its creators of the jingle derived it as an act of artistic creativity. *See id.*

89 *Id.* at 22-24. The striking similarities did not offset the lack of evidence on the issue of access. *Id.* at 21-24.

90 *See* 1 PAUL GOLDSTEIN, COPYRIGHT § 2.5.1, at 85 (1989); MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 91 (3d ed. 1999); 1 PATRY, *supra* note 42, at 126-27; *see also* Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 830-34 (2008) (discussing the history of copyright law and pornography and noting that until 1979 copyright protection was effectively unavailable for pornographic photographs and audio-visual works).

91 Zimmerman, *supra* note 17, at 87 n.49.

92 *See* 1 PATRY, *supra* note 42, at 126-27 n.26 (lengthy footnote discussing cases, most of them decided in the nineteenth century before *Bleistein* was decided in 1903, that denied protection to works perceived as obscene); Zimmerman, *supra* note 17, at 100 (noting that prior to *Bleistein*, obscene or sexually explicit works were denied protection because they did not promote the progress of science). The decision in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), and others arguably rendered the clause’s preamble irrelevant. *See Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (upholding term extension notwithstanding the argument that adding 20 years to the life of existing copyrights did not promote the progress of science); *Lee v. Runge*, 404 U.S. 887, 887-91 (1971) (Douglas J., dissenting) (denial of certification); Zimmerman, *supra* note 17, at 100-01; David E. Shipley, *Congressional Authority Over Intellectual Property Policy After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255, 1260 (2007).

cited and quoted extensively by the Fifth Circuit Court of Appeals that while ruling that obscenity is not a defense to a copyright infringement claim.⁹³

*Mitchell Brothers Film Group v. Cinema Adult Theater*⁹⁴ is the key case. The facts were simple: the plaintiffs owned the copyright on the pornographic movie *Behind the Green Door*; they sued for infringement because defendants obtained copies of the film without permission and showed it in theaters.⁹⁵ Defendants raised obscenity as an affirmative defense—the plaintiffs had unclean hands and were therefore barred from relief.⁹⁶ The Fifth Circuit ruled that the district court erred in permitting the assertion of this affirmative defense.⁹⁷ It stated that there was “not even a hint in the language [of the 1909 Copyright Act] that the obscene nature of a work renders it any less a copyrightable ‘writing.’ There is no other statutory language from which it can be inferred that Congress intended that obscene materials could not be copyrighted.”⁹⁸ The court added that the legislative history of the 1976 Act showed that Congress intended “to continue the policy of the 1909 Act of avoiding content restrictions on copyrightability,” and it appeared to the court that

Congress has concluded that the constitutional purpose of its copyright power, “[t]o promote the Progress of Science and useful Arts,” is best served by allowing all creative works (in a copyrightable format) to be accorded copyright protection regardless of subject matter or content, trusting to the public taste to reward creators of useful works and to deny creators of useless works any reward.⁹⁹

The *Mitchell Brothers* opinion includes a lengthy quote from *Bleistein*, as well as discussions of First Amendment problems with content based restrictions on speech, the constitutionality of the Copyright Act, and older cases that had denied redress for holders of copyright on works found to be immoral or obscene.¹⁰⁰

A variation on this issue was litigated in *Pillsbury Co. v. Milky Way*

93 See *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 863 (5th Cir. 1979), *cert denied*, 445 U.S. 917 (1980); see also *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406 (9th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982) (heavily relying on *Mitchell Bros.* while not citing *Bleistein*).

94 *Mitchell Bros.*, 604 F.2d 852.

95 *Id.* at 854.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 855 (quoting U.S. CONST. art I, § 8, cl. 8).

100 See *id.* at 855–65; see also LEAFFER, *supra* note 90, at 91.

*Productions, Inc.*¹⁰¹ This case involved claims against the pornographic adaptation of well-recognized works: Pillsbury's familiar jingle, "Nothin says lovin' like something from the oven, and Pillsbury says it best" (a.k.a. the "Pillsbury Baking Song"), and Pillsbury's characters "Poppin' Fresh" and "Poppie Fresh."¹⁰² The copyrightability of these works was not questioned.¹⁰³ Defendant admitted using the words from the jingle in a picture of figures closely resembling the two characters engaged in sexual relations.¹⁰⁴ Did the fact that defendant Milky Way's use of these familiar works was pornographic bolster Pillsbury's infringement claim? As discussed later in this Article, this infringement of Pillsbury's copyrights was held to be a fair use.¹⁰⁵ In reaching this decision the court stated:

The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but, in the court's judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use.¹⁰⁶

Jartech, Inc. v. Clancy, decided by the Ninth Circuit in 1982, relied on *Mitchell Brothers* and reached the same conclusion: obscenity is not a defense to a copyright infringement claim.¹⁰⁷ Plaintiffs were producers, distributors, and displayers of adult films, and the defendants allegedly infringed on the copyrights of five of plaintiffs' movies by taking photographs of screen images every few seconds while a film was being shown in a theater and simultaneously tape recording the movies' sound tracks.¹⁰⁸ The Ninth Circuit ruled that obscenity was not a defense to an infringement claim. The court further noted that it had held fraudulent materials copyrightable in *Belcher v. Tarbox*, and that the Fifth Circuit's decision in *Mitchell Brothers*

¹⁰¹ Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981).

¹⁰² *Id.* at 125-26.

¹⁰³ *Id.* at 129 (the defendants stipulated the validity of plaintiff's copyright).

¹⁰⁴ *Id.* at 126, 129.

¹⁰⁵ See *infra* text and notes at notes 177-82.

¹⁰⁶ Pillsbury, 215 U.S.P.Q. (BNA) at 131. The court later said that it did not "condone the manner in which Milky Way chose to assault the corporate citadel, but value judgments have no place in this analysis." *Id.* at 132.

¹⁰⁷ *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982).

¹⁰⁸ *Id.* at 405. The defendants, an attorney and members of the Santa Anna City Council, had drafted an ordinance aimed at ridding the city of adult movie theaters, and a resolution, declaring the plaintiffs' theater to be a nuisance, was adopted. *Id.* at 404-05. The photos and the recording were made before this resolution was adopted and were used to show the Council that the theater was showing pornography. *Id.* at 405.

relied heavily on *Belcher* in ruling that obscenity was not a defense to copyright infringement.¹⁰⁹ Additionally, the court pointed out that that Nimmer's treatise endorsed *Mitchell Brothers* and that the 1976 Act should be interpreted the same way as the 1909 Act.¹¹⁰ The court concluded, however, that the defendants had made fair use of the plaintiffs' copyrighted works.¹¹¹

What is the end result of these decisions? The prevailing view is that a work of authorship many might regard as pornographic, obscene, or immoral is copyrightable, assuming it owes its origin to its author and exhibits sufficient creativity. As noted earlier, these are not substantial hurdles.¹¹² It should not matter whether the author's creation is obscene, pornographic, in bad taste, offensive, repulsive, or simply bad, crummy, lousy, juvenile, terrible etc., so long as the work owes its origin to the author and satisfies the modest level of creativity standard. If the work meets these standards, then it is entitled to copyright protection. Based on this, I am sure that the late George Carlin's best-known routine, "Seven Words You Can Never Say on Television," recorded in 1972 on an album called *Class Clown*¹¹³ is copyrightable. Those seven words that he selected from the English language should be protectible, too, but the copyright would be thin.¹¹⁴

On the other hand, even though the court in *Pillsbury* stated that the pornographic use of a particular work did not militate against a finding of fair use,¹¹⁵ several of the decisions discussed in the next section show that some courts are not completely neutral or objective in determining whether an obscene or pornographic use is a fair use. They seem to make value judgments that go against Justice Holmes' principle of aesthetic nondiscrimination.

¹⁰⁹ *Id.* at 406.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 408; see *Guccione v. Flynt*, No. 83 Civ. 8020 (RWS), 1984 WL 18 (S.D.N.Y. 1984) (Hustler Magazine's reproduction of a copyrighted photo from Penthouse Magazine in connection with an article critical of Penthouse's publisher for posing fully clothed with his nude models held to be fair use); *JOYCE ET AL*, *supra* note 5, at 98–99 n.8.

¹¹² See *supra* notes 31–44 and accompanying text.

¹¹³ See Mel Watkins & Bruce Weber, *George Carlin, Comic Who Chafed at Society and Its Constraints, Dies at 71*, N.Y. TIMES, June 24, 2008, at C12.

¹¹⁴ See Shipley, *supra* note 21, at 130–32. The seven are the commonly used, but crude, English language words for excrement, urine, sexual intercourse, the vagina, a person who performs fellatio, a person who has intercourse with his or her mother, and breasts. See *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (Appendix to the Opinion of the Court). In addition, Carlin later referred to three additional "auxiliary" commonly used terms for flatulence, excrement, and the vagina. *Id.* at 755. How would this ad slogan be treated? "You would have to be a rooster to get a better piece of chicken!" It might be offensive to some people, but assuming it is original to the restaurant, I am confident that it meets the "creativity" requirement.

¹¹⁵ *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. (BNA) 124, 131 (N.D. Ga. 1981); see *supra* notes 100–06 and accompanying text.

II. BAD TASTE, OFFENSIVE WORKS, PORN AND FAIR USE—IS IT REALLY PARODY?

Many of my favorite bad taste, bad joke, and raunchy humor cases involve alleged parodies of popular movies, songs, television shows, and cartoon characters, many of which almost beg to be mocked and ridiculed. Some of these cases date from the late 1970s and 1980s and a few follow the Supreme Court's 1994 landmark decision in *Campbell v. Acuff-Rose Music, Inc.* (the *Pretty Woman* decision).¹¹⁶ It concerned what many music fans might regard as a truly offensive parody of the classic Roy Orbison recording of the song, "Oh, Pretty Woman."¹¹⁷ Part of me thinks this section should start with a discussion of the *Pretty Woman* decision because *Pretty Woman* "accorded parody its own place at the table of fair comment and criticism."¹¹⁸ On the other hand, part of me feels I should cover my favorite cases in chronological order so readers can get a better understanding of the impact of the *Pretty Woman* decision on how courts now evaluate parodies that might be regarded as in bad taste, offensive and/or pornographic. I have opted for the chronological treatment. But first, a general primer on fair use is necessary.

A. Fair Use Fundamentals

Fair use is an established limitation on copyright,¹¹⁹ codified at 17 U.S.C. § 107,¹²⁰ which recognizes that a variety of unauthorized uses of protected material do not infringe copyright.¹²¹ The doctrine, developed in the mid-nineteenth century,¹²² enables courts to escape literal application of copyright restrictions. This allows courts to avoid harsh consequences while reaching laudable results that promote the creativity that copyright

¹¹⁶ *Campbell v. Acuff-Rose Music, Inc.* (*Pretty Woman*), 510 U.S. 569 (1994).

¹¹⁷ *Id.* at 572. The composition was written by Roy Orbison and William Dees, but Acuff-Rose Music held the copyright. *Id.*

¹¹⁸ Zissu, *supra* note 31, at 393.

¹¹⁹ See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 345, 347-49 (C.C.D. Mass. 1841) (No. 4,901) (the first United States case involving fair use). See generally *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-51 (1984).

¹²⁰ 17 U.S.C. § 107 (2006).

¹²¹ H.R. REP. NO. 94-1476, at 65-66 (1976). A person making fair use of a work is not an infringer. *Sony*, 464 U.S. at 433. The listing of exclusive rights in § 106 is prefaced by the phrase "subject to sections 107 through 122." 17 U.S.C. § 106 (2006). Those sections describe uses which are not infringements, and the most general is § 107, the codification of fair use. 17 U.S.C. § 107 (2006). Thus, the defense allows certain uses notwithstanding the copyright owner's exclusive rights. *Sony*, 464 U.S. at 447.

¹²² See *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136); *Folsom*, 9 F. Cas. at 347-49.

is intended to encourage.¹²³ It is a privilege to use copyrighted material in a reasonable manner without the copyright owner's consent.¹²⁴ Although the courts have considered a variety of factors in determining fair use,¹²⁵ fixed criteria have never been established because the doctrine is an "equitable rule of reason."¹²⁶ When Congress endorsed the doctrine in §107 of the 1976 Act, it intended to restate fair use, not to freeze it or change it any way. There is no rigid, bright-line approach to fair use. Each case must be decided on its own merits.¹²⁷

Section 107 lists several activities in its preamble that might be regarded as fair use, including criticism and comment.¹²⁸ It then identifies four factors which the courts "shall" consider in determining whether a particular use is fair: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used; and 4) the effect of the use on the potential market for or value of the copyrighted work.¹²⁹ The statute, its legislative history,¹³⁰ and case law establish that no single factor is necessarily determinative.¹³¹ The section's listed activities and factors are not intended to be exhaustive. Additionally, Congress did not assign weights to the factors, and did not prescribe a particular order in which to evaluate them. The factors are for "balancing the equities," and courts are free to adapt the doctrine to particular situations on a case-by-case basis.¹³²

¹²³ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2009); see H.R. REP. NO. 94-1476, at 66; *Iowa State Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

¹²⁴ HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944); see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (citing and quoting the Ball treatise).

¹²⁵ See *Sony*, 464 U.S. at 475-76 n.27 (Blackmun, J., dissenting).

¹²⁶ *Id.* at 448; H.R. REP. NO. 94-1476, at 65.

¹²⁷ H.R. REP. NO. 94-1476, at 65-66.

¹²⁸ Parody is not listed, perhaps out "of a belief that the lack of reference would result in more generous treatment of it as a form of criticism and comment." PATRY, *supra* note 42, at 742-43 n.97 (discussing the decision made in 1964 to not include parody in the list); see H.R. REP. NO. 94-1476, at 65. Parody and satire are both important forms of criticism and comment. "Parody is generally taken to mean humorous imitation of a particular work" that pokes fun at that work "while satire . . . extends to using a [particular] work to critique or ridicule other facets or members of society." Suzor, *supra* note 31, at 219.

¹²⁹ 17 U.S.C. § 107(1)-(4) (2006).

¹³⁰ See H.R. REP. NO. 94-1476, at 65-66. Section 107's legislative history is important as indicated by the Supreme Court's reference to it in cases like *Sony*, 464 U.S. at 448-50, and *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549-50, 552-54 (1985).

¹³¹ See, e.g., *Pacific & Southern Co. v. Duncan Co.*, 744 F.2d 1490, 1494-98 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

¹³² H.R. REP. NO. 94-1476, at 65-66. See generally David Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. REV. 983, 992-94 (1986) (discussing the freedom to adapt the fair use doctrine on a case-by-

B. Cases Prior to the Pretty Woman Decision

In considering raunchy and offensive parodies, I am not talking about the famous Jack Benny spoof of the movie *Gas Light* that starred Ingrid Bergman, Charles Boyer and Joseph Cotten. Benny's parody, called *Autolight*, was shown nationally by CBS.¹³³ Nor am I concerned with the Sid Caesar skit shown nationally on NBC, called *From Here to Obscurity*. This playlet poked fun at several scenes from the award winning movie, *From Here to Eternity*, including the often parodied scene of Burt Lancaster romancing Deborah Kerr on the beach as the surf rolled over them. In the televised version Caesar and Imogene Coca played the key roles on the sand.¹³⁴

I love those two old cases, but their facts are pretty tame. After all, the parodies were shown on national television in the early 1950s. Similarly, the song parodies at issue in the Second Circuit's influential decision, *Berlin v. E.C. Publications* (the *Mad Magazine* decision),¹³⁵ might have been juvenile, but were hardly nasty or naughty. The court held that *Mad Magazine's* satiric parody lyrics, written in the same meter as the original lyrics for a substantial number of popular songs, did not infringe. *Mad Magazine* did not reproduce the actual music because the tunes were so popular that readers would know their familiar melodies. "A Pretty Girl Is Like a Melody" became "Louella Schwartz Describes Her Malady," and "The Last Time I Saw Paris" became "The First Time I Saw Maris."¹³⁶ The court noted that the targets of *Mad Magazine's* satire were not the plaintiffs' songs, but what the magazine called "the idiotic world we live in today."¹³⁷

case basis).

133 *Loew's, Inc. v. CBS*, 131 F. Supp. 165, 167-70 (C.D. Cal. 1955), *aff'd*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956) *aff'd by an equally divided Supreme Court*, 356 U.S. 43 (1958). The trial court ruled that Jack Benny's burlesque of the movie was infringement, and the Court of Appeals affirmed, noting that if "the material taken by appellants from 'Gas Light' is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue." *Benny*, 239 F.2d at 536. The late Benjamin Kaplan wrote that the decision was wrong, possibly unconstitutional. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967). Incidentally, Benny burlesqued the role Charles Boyer played, and his special guest on the show was Ingrid Bergman who, in the words of the trial court, "performed a travesty upon her original screen role." *Loew's*, 131 F. Supp. at 169. See generally Ochoa, *supra* note 28, at 571-73 (discussing criticisms of the *Loew's* decision).

134 *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348, 358-59 (S.D. Cal. 1955) (holding that Caesar's burlesque of the movie did not infringe). There are several cases dating from the first part of the twentieth century in which parodies were held to infringe, but in each the copying was substantial and the courts felt that the parody could fulfill demand for the original. See, e.g., *Green v. Luby*, 177 F. 287, 287-88 (S.D.N.Y. 1909) (parody of a performer's style while singing an entire song); *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 359-60 (S.D.N.Y. 1914) (parody of the comic strip "Mutt and Jeff"); Zissu, *supra* note 31, at 400.

135 *Berlin v. E.C. Publ'ns, Inc. (Mad Magazine)* 329 F.2d 541, 542-43 (2d Cir. 1964).

136 *Id.* at 543.

137 *Id.*; Zissu, *supra* note 31, at 401. Does this mean that the *Mad* spoofs would not have

I was thirteen and an avid reader of *Mad Magazine* at the time of the *Mad Magazine* decision. Once I started teaching Copyright many years later, I came to appreciate the following statement from the court:

While the social interest in encouraging the broad-gauged burlesques of *Mad Magazine* is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. Cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). For, as a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.¹³⁸

The cases that push the fair use/parody defense into the domain of the raunchy and lewd test this statement. Will a court allow a raunchy or obscene parody as a fair use or just pay lip service to its value as a form of criticism?¹³⁹

Some of the cases that push the envelope involve Walt Disney Productions and uses of Disney's popular and very valuable properties in ways that Disney never intended. Let us start with pornography and a movie titled *The Life and Times of the Happy Hooker*. Disney was upset because at one point in the film three male actors, wearing nothing but Mouseketeer hats, sang some of the words to the "Mickey Mouse March," and then the familiar march was

[p]layed as background music while the female protagonist of the film appears to simultaneously gratify the sexual drive of the three other actors while the group of them is located on or near a billiards table. The gratification is apparently done orally, anally and vaginally. Supposedly, according to the story line of the film, the three male actors were teenagers "whose father had arranged for her (the female protagonist) to be present as a birthday surprise for them."¹⁴⁰

The defendant film producers argued that their use of the march was fair use, claiming that its parody emphasized the "'transition of such teenagers from childhood to manhood . . . in a highly comical setting,' and

satisfied the "target of the parody" test announced in the *Pretty Woman* decision? See *infra*, notes 215-38 and accompanying text.

¹³⁸ *Mad Magazine*, 329 F.2d at 545.

¹³⁹ See generally Lehr, *supra* note 28 (analyzing several of the cases discussed in this Article and arguing that the fair use doctrine, before and after the decision in *Campbell v. Acuff-Rose Music, Inc.* (*Pretty Woman*), 510 U.S. 569 (1984), is too flexible in allowing courts to impermissibly censor parodies).

¹⁴⁰ *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1397-98 (S.D.N.Y. 1975).

as such is merely a 'humorous take-off' on the music."¹⁴¹ The court did not buy the argument. The original song lasts two minutes, yet the defendants used it over and over, far more than necessary. This use was, according to the court, far from parody. Although they "may have been seeking in their display of bestiality to parody life, they did not parody the "Mickey Mouse March" but sought only to improperly use the copyrighted material."¹⁴² Put another way, the defendants failed to comment on or target the copyrighted work; the march itself was not the target of their so-called parody. Instead, they used it to get attention or perhaps to avoid the drudgery of doing something fresh.¹⁴³ Moreover, the movie was pornographic.

*Walt Disney Productions v. The Air Pirates*¹⁴⁴ also illustrates the risk of impugning the honor and reputation of Disney's intellectual property. The defendants used seventeen of Disney's most popular and well-recognized cartoon characters, including Mickey Mouse, Minnie Mouse and Goofy, and put them in "adult 'counter-culture' comic books."¹⁴⁵ The defendants' graphic depictions of the characters were markedly similar to Disney's graphics, and their names for the characters were the same as Disney's, but the theme of defendants' publication was markedly different from the Disney image of "innocent delightfulness."¹⁴⁶ *The Air Pirates* was an underground comic book that placed the Disney characters "in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world."¹⁴⁷ The comic "centered around 'a rather bawdy depiction of the Disney characters as active members of a free thinking,

¹⁴¹ *Id.* at 1398.

¹⁴² *Id.* at 1398; cf. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 202-03 (2d Cir. 1979). In *Dallas Cowboys Cheerleaders* the defendants were enjoined from distributing the X-rated movie "Debbie Does Dallas" in which several characters performed sex acts while clad in cheerleader uniforms confusingly similar to plaintiff's uniform. *Dallas Cowboys Cheerleaders*, 604 F.2d at 204. The defendants argued, among other things, "fair use" and parody in response to what were trademark/trade dress infringement claims. *Id.* at 205-06. The court said it was unlikely the fair use was applicable to trademark infringement but ultimately said it did not have to reach that issue because defendants' use of the uniform did not qualify as parody or any form of "fair use." *Id.* Whether or not a spoof or take-off had to comment on the original in order to be treated as a parody and fair use was a bone of contention until the Supreme Court's *Pretty Woman* decision. See *Pretty Woman*, 510 U.S. at 580 (1994).

¹⁴³ See *Pretty Woman*, 510 U.S. at 587-88. The defendant in *Mature Pictures* appropriated far more than necessary to conjure up the original, even under the generous standard announced by the Second Circuit in *Mad Magazine*, 329 F.2d 541 (2d cir. 1964). See *Mature Pictures*, 389 F.Supp. at 1398; see also 4 NIMMER & NIMMER, *supra* note 123, § 13.05[C][1] n.351. But see Bisceglia, *supra* note 30, at 29-32; Richard A. Bernstein, *Parody and Fair Use in Copyright Law*, 31 COPYRIGHT L. SYMP. (ASCAP) 1, 39 (1984).

¹⁴⁴ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 752, 745 (9th Cir. 1978).

¹⁴⁵ *Id.* at 752-53.

¹⁴⁶ *Id.* at 753.

¹⁴⁷ *Id.* at 753 (quoting Kevin W. Wheelwright, Comment, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. Rev. 564, 571, 582 (1976)).

promiscuous, drug ingesting counterculture.”¹⁴⁸

After extended discussions of copyright protection for the characters, the fundamentals of copyright infringement, fair use, parody as fair use, decisions like Jack Benny’s litigation in *Gas Light* versus *Autolight* and the *Mad Magazine* song parodies case, the Ninth Circuit concluded that the defendants had taken “more than [is] allowed even under the [*Mad Magazine*] test as applied to both the conceptual and physical aspects of the characters.”¹⁴⁹ Since the copying was excessive, summary judgment for Disney was affirmed.¹⁵⁰ The court also indicated in a footnote that copying a protected work to satirize society generally instead of poking fun at or ridiculing the copied work in some way made it more difficult to justify fair use.¹⁵¹ I regard this footnote as sort of a gratuitous statement because it seemed rather obvious that the *Air Pirates* comics were targeting the appearances and the personalities of the very familiar and popular Disney characters while challenging widely held conceptions about life in America. In doing so, they took far more than necessary to recall and conjure up those attributes.¹⁵²

The Fifth Circuit cited and discussed the *Air Pirates* decision in affirming the grant of a preliminary injunction blocking the distribution of a poster that infringed a popular poster featuring five Dallas Cowboys Cheerleaders.¹⁵³ The defendant’s poster had five former Cowboys Cheerleaders wearing uniforms nearly identical to the official uniforms. They were positioned like the cheerleaders in the plaintiff’s poster with a similar backdrop. The major differences were the large script “The Ex–Dallas Cowboys Cheerleaders” at the bottom of the defendant’s poster and, most importantly, the ex–cheerleaders’ halter–tops were unbuttoned, leaving their breasts exposed.¹⁵⁴ The offending poster was an obvious imitation of the plaintiff’s popular poster, so the defendant argued “the partial nudity of the women in their poster is a parody of the original” and, thus, is a fair use.¹⁵⁵

The Court of Appeals said that not all parodies and satires are protected as fair use. The court also discussed the *Gaslight* and *Air Pirates* cases,

¹⁴⁸ *Id.*

¹⁴⁹ *Air Pirates*, 581 F.2d at 757.

¹⁵⁰ *Id.* at 758.

¹⁵¹ *Id.* at 758 n.15; see Netanel, *supra* note 33, at 1910 (explaining how the use of the Disney characters added force to the defendants’ satirical statement about American life); Ochoa, *supra* note 28, at 577; Zissu, *supra* note 31, at 403 (noting that the 9th Circuit did not evaluate the impact of the comics on the market for or value of Disney’s works).

¹⁵² See 4 NIMMER & NIMMER, *supra* note 123, § 13.05[C][1] n.351.

¹⁵³ *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

¹⁵⁴ *Id.* at 1186.

¹⁵⁵ *Id.* at 1188.

acknowledged that the line between fair use and infringement is often hard to divine, and faulted the defendant for not developing proof on this defense.¹⁵⁶ The court said that the "simple allusion to the concept of parody" was insufficient to prove fair use and shift the balance in the defendant's favor.¹⁵⁷ Given the "unelaborated invocation of the term 'parody,'" it was not an abuse of discretion for the trial judge to grant injunctive relief.¹⁵⁸ This decision should not, however, be regarded as an outright rejection of fair use for this bare-breasted spoof of the copyrighted poster. The court stated that the defense "might have prevailed" had the proof been developed.¹⁵⁹

Explicit reference to sexual acts has caused substantial problems for raunchy spoofs that are defended as being parodies. "Boogie Woogie Bugle Boy of Company B" is a copyrighted song first made popular in the early 1940s through a recording by the Andrews Sisters and again in the 1970s in a recording by Bette Midler. This catchy tune was the subject of a "take-off" in a show called *Let My People Come* that was performed many times in New York City between January 1974 and July 1976.¹⁶⁰ This play was an "erotic nude show" that had "sexual content raunchy enough to satisfy the most jaded porno palate."¹⁶¹

Based on the *Mature Pictures* decision regarding the use of the "Mickey Mouse Club March" in a pornographic movie, discussed above, simply playing the Bette Midler or Andrews Sisters renditions of "Boogie Woogie Bugle Boy" might have caused substantial problems for the producers of *Let My People Come*.¹⁶² However, they did considerably more than perform the song during their musical. They took the alliterative description of a soldier in Company B and changed the lyrics to describe alliteratively the "Cunnilingus Champion of Company C."¹⁶³ In *MCA, Inc. v. Wilson*, the Second Circuit agreed with the trial court's finding that the songs were substantially similar. Contrary to rulings by other courts, the court conceded that a fair use parody need not be directed toward the copyrighted work.¹⁶⁴

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1188-89.

¹⁵⁹ *Id.* at 1188. The plaintiff's poster had sold over three quarter of a million copies at \$2.50 each. *Id.* at 1186.

¹⁶⁰ *MCA, Inc. v. Wilson*, 677 F.2d 180, 181-82 (2d Cir. 1981).

¹⁶¹ *Id.* at 181. The play was not concerned with fornication but "fellatio and cunnilingus." *Id.*

¹⁶² *See supra* notes 139-43 and accompanying text.

¹⁶³ *MCA*, 677 F.2d at 182.

¹⁶⁴ *Id.* at 185, 188-89 (Mansfield, J., dissenting). Even though the Second Circuit's decision in *Berlin v. E.C. Publ'ns, Inc. (Mad Magazine)*, 329 F.2d 541 (2d Cir. 1964), did not seem to require the defendant's spoof to target the plaintiff's work, the trial court's ruling on this point was confusing. Zissu, *supra* note 31, at 405. The Supreme Court later addressed this issue—whether the parody had to comment in some way on the plaintiff's copyrighted work—in the *Pretty Woman* case and said that the heart of parody is "use of some elements

Nevertheless, the court concluded that the defendants' use of the song in the play was not a fair use:

The district court held that defendants' song was neither a parody or burlesque of Bugle Boy nor a humorous comment on the music of the '40s. We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire of the mores of society. Such a holding would be an open-ended invitation to musical plagiarism. We conclude that the defendants did not make fair use of plaintiff's song.¹⁶⁵

Judge Mansfield wrote a strong dissent in *MCA v. Wilson*, asserting that the defendants produced "what amounts to a sexual satire or burlesque of contemporary mores by putting a comic or humorous twist on the conventional Bugle Boy [song] and by parodying the Andrews Sisters' style, which depended heavily on 'boogie-woogie' music. This entitled the defendants to the protection of the 'fair use' doctrine . . ." ¹⁶⁶ He also made a powerful statement regarding the offensive and obscene nature of defendants' lyrics that built on the Second Circuit's earlier pro-parody statement in the *Mad Magazine* case:¹⁶⁷

In my view the defendants' use of "dirty lyrics" or of language and allusions that I might personally find distasteful or even offensive is wholly irrelevant to the issue before us, which is whether the defendants' use, obscene or not, is permissible under the fair use doctrine as it has evolved over the years. We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances. Obscenity or pornography play no part in this case. Moreover, permissible parody, whether or not in good taste, is the price an artist pays for success, just as a public figure must tolerate more personal attack than the average private citizen.¹⁶⁸

Both the majority and the dissent in *MCA v. Wilson* discussed the impact

of a prior author's composition to create a new one that, at least in part, comments on that author's work." *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 587-88 (1984). Without this comment on the original, the claim of fairness diminishes. *Id.*; compare *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115 (2d Cir. 1998), with *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997); see *infra* notes 318-34 and accompanying text.

¹⁶⁵ *MCA*, 677 F.2d at 185 (majority opinion) (internal citation omitted).

¹⁶⁶ *Id.* at 188 (Mansfield, J., dissenting).

¹⁶⁷ See *supra* notes 134-39.

¹⁶⁸ *MCA*, 677 F.2d at 190. "*MCA* may be viewed as influenced primarily by the majority's perception of defendants' use as distasteful and offensive." Zissu, *supra* note 31, at 405. Realistically, the defendants' parody was not a substitute for *Bugle Boy*. *Id.* at 406.

of *Elsmere Music, Inc. v. NBC*.¹⁶⁹ This case did not involve sodomy, but it did have references to that city in the Old Testament known for sin, bestiality and debauchery: Sodom.¹⁷⁰ The cast of Saturday Night Live (SNL) did a skit that poked fun at New York City's public relations campaign that featured the Rockettes and a catchy theme song with the lyrics "I Love New York." The four-minute SNL skit had the city fathers of Sodom trying to figure out how to improve the city's image and ended with the cast doing a chorus line and singing "I Love Sodom" to the tune of "I Love New York."¹⁷¹ Even though the skit attempted to parody the song and the advertising campaign, the trial court rejected the requirement that the parody had to satirize the work it conjured up,¹⁷² and held this was a fair use. The court of appeals affirmed and made the following statement: "Believing that, in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody, and that the District Court correctly applied the doctrine of fair use, we affirm on Judge Goettel's thorough opinion."¹⁷³

I love that statement. It is a way of telling the plaintiff/copyright owner to "Lighten up!" or asking "Can't you take a joke?" I also like the trial court's statement that "the issue to be resolved by a court is whether the use in question is a valid satire or parody, and not whether it is a parody of the copied [work] itself."¹⁷⁴ As will be discussed later, this expansive approach to parody and satire was subsequently modified by the Supreme Court.¹⁷⁵

About the same time that the Second Circuit was ruling against the alleged parody of "Boogie Woogie Bugle Boy" in the erotic musical *Let My People Come*, a trial court in Georgia ruled that a picture depicting Pillsbury's familiar characters "Poppin' Fresh" and "Poppie Fresh" engaged in sexual relations was a fair use. This parody ad, published in *Screw* magazine, also featured Pillsbury's jingle, "Nothin Says Lovin"—called the "Pillsbury

¹⁶⁹ *Elsmere Music, Inc. v. NBC*, 623 F.2d 252 (2d Cir. 1980), *aff'g* 482 F. Supp. 741 (S.D.N.Y. 1980).

¹⁷⁰ Actually, the Second Circuit's decision is a short *per curiam* opinion, and the many references to Sodom are in the trial court's opinion. *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741 (S.D.N.Y. 1980).

¹⁷¹ *Elsmere Music*, 623 F.2d at 253.

¹⁷² *Elsmere Music, Inc. v. NBC*, 482 F. Supp. at 746 ("To the extent that [other decisions] can be read to require that there be an identity between the song copied and the subject of the parody, this Court disagrees."). The song was associated with New York City and was an appropriate target of parody. *Id.*

¹⁷³ *Elsmere Music*, 623 F.2d at 253; *see* Zissu, *supra* note 31, at 404.

¹⁷⁴ *Elsmere Music v. NBC*, 482 F. Supp. at 746; *see* Bernstein, *supra* note 143, at 34-37 (discussing the *Elsmere* decision and finding it refreshing how the court took notice of the role parody has in advancing the public interest).

¹⁷⁵ *See infra* notes 231-40 and accompanying text; *see also* 4 NIMMER & NIMMER, *supra* note 123, at § 13.05[C][1].

Baking Song.”¹⁷⁶ Although Judge O’Kelley declined the defendant’s request to characterize its portrayal as a satire or parody,¹⁷⁷ his discussion of the purpose and character of the use factor¹⁷⁸ states:

After reviewing Milky Way’s presentation, the court concludes that it is more in the nature of an editorial or social commentary than it is an attempt to capitalize financially on the plaintiff’s original work. Although the portrayal is offensive to the court, the court has no doubt that Milky Way intended to make an editorial comment on the values epitomized by these trade characters.¹⁷⁹

The court might as well have said that the defendant’s picture was a parody.

Pillsbury also argued that the court should have considered the salacious content of *Screw* magazine. The court’s response to this argument was consistent with Judge Mansfield’s dissent in the *Boogie Woogie Bugle Boy* decision:

The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but . . . the fact this use is pornographic in nature does not militate against a finding of fair use.¹⁸⁰

Notwithstanding this strong statement, there was still uncertainty in the early 1980s about whether the fair use defense narrowed when a parody

¹⁷⁶ *Pillsbury Co. v. Milky Way Prods.*, 215 U.S.P.Q. 124, 126 (N.D. Ga. 1981). The parody picture also had Pillsbury’s familiar barrelhead trademark. *Id.*

¹⁷⁷ *Id.* at 129–30. The court said that Milky Way had not furnished the court with any basis for making this determination and noted that the terms satire and parody did not have a fixed definition among literary critics. *Id.* The court cited *MGM v. Showcase Atlanta Coop. Prods.*, 479 F. Supp. 351 (N.D. Ga. 1979), involving a three-hour long musical called *Scarlett Fever* based on the movie *Gone With the Wind*. The trial court held that this musical was neither a satire or a parody, and even if it was a parody the defendants had copied more than the law allowed. Summary judgment was eventually granted for the MGM on defendant’s fair use defense. *MGM v. Showcase Atlanta Coop. Prods.*, 215 U.S.P.Q. (BNA) 685 (N.D. Ga. 1981). The musical was neither salacious nor obscene. *See also* Bernstein, *supra* note 143, at 25–26.

¹⁷⁸ *See* 17 U.S.C. § 107(1) (2006).

¹⁷⁹ *Pillsbury*, 215 U.S.P.Q. (BNA) at 131. The court discussed both *MCA v. Wilson* and *Elsmere Music* in a footnote. *Id.* at 131 n. 9.

¹⁸⁰ *Id.* at 131. The court discussed the impact of *Mitchell Brothers Film* in a footnote. *Id.* at 131 n. 10; *see supra* notes 94–100.

early 1980s about whether the fair use defense narrowed when a parody took the form of scatological humor.¹⁸¹

Other familiar comic book and cartoon characters have been used in raunchy settings. DC Comics holds the copyrights and trademarks to Superman and Wonder Woman. In 1984, DC Comics sued several defendants who were engaged in the singing telegram business. Two of the defendants' skits featured characters named Super Stud and Wonder Wench.¹⁸² The cast of the Super Stud skit included a reporter from the *Daily News* named Dark Dent accompanied by a monkey named Jimmy Olson. The basics of the skit were that Dent, who concludes he is too "mild mannered" to do a singing telegram, announces, "This must be a job for Super Stud," strips off his clothes to reveal a Superman-like outfit, and recites lines sounding much like, "It's a bird! It's a plane! It's Superman!"¹⁸³

The court had no difficulty granting summary judgment for DC Comics, concluding that the defendants had infringed its trademarks and copyrights.¹⁸⁴ The defendants' fair use defense failed. The court found that the "[d]efendants do not engage in critical comment that constitutes part of the 'free flow of ideas' underlying the doctrine of fair use. Instead, they seek to augment the commercial value of their own property by creating new, and detrimental, associations with plaintiff's property."¹⁸⁵ In a footnote, the court noted that the script included references to "aphrodisiacs" and other sexually-suggestive items, as well as the fact that "the character delivers the message by retrieving it from inside his pants."¹⁸⁶

Moreover, "[h]ere both of the challenged skits have been sold on the strength of their associations with plaintiff's originals, not on the strength of defendants' imagination and originality. Trading upon the imagination and originality of another is not fair use."¹⁸⁷ In our post-*Pretty Woman* world, the court might have said that the defendants' use of DC Comics' characters was not transformative and failed to comment on the original. It was neither a parody nor a satire.

The Ninth Circuit had two important fair use rulings in 1986 touching on subject matter that might be considered immoral or in bad taste. One

181 See *Warner Bros., Inc. v. ABC*, 720 F.2d 231, 243 n.8 (2d Cir. 1983) (paraphrasing dicta in decision holding that ABC's television show *The Greatest American Hero* did not infringe *Superman*).

182 *D.C. Comics, Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110, 112 (N.D. Ga. 1984).

183 *Id.* at 114 ("[F]aster than a speeding tortoise, more powerful than an armpit, able to leap tall broads in a single bound . . .").

184 *Id.* at 116-17, 119.

185 *Id.* at 118.

186 *Id.* at 118 n.1.

187 *Id.* at 119.

lyrics and style of a popular recording of a familiar song were parodied. The other decision, *Hustler Magazine, Inc. v. Moral Majority, Inc.*,¹⁸⁹ had the creator of a parody advertisement suing the person targeted by the parody for reproducing the parody print ad and distributing copies of it in a fund-raising effort. Both are interesting and fun cases.

The musical work at issue in *Fisher v. Dees* was the 1950s standard, “When Sunny Gets Blue,” as performed by Johnny Mathis—a singer with a very recognizable voice and style.¹⁹⁰ The defendant, a disc jockey named Rick Dees, recorded a comedy album titled *Put It Where the Moon Don’t Shine* and one of the cuts on this album was *When Sunny Sniffs Glue*.¹⁹¹ The parody copied the first six of the song’s thirty-eight bars (the main theme) and changed the opening lyrics as follows: Fisher’s version was—“When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall,” while Dees’ version was—“When Sunny sniffs glue, her eyes get red and bulgy, then her hair begins to fall.”¹⁹²

This parody, which sounds just like Johnny Mathis, runs for just twenty-nine seconds,¹⁹³ and it seems pretty tame compared to what *Screw* magazine had Poppin’ and Poppie Fresh doing and the lyrics in the “Boogie Woogie Bugle Boy” parody. Still, the plaintiffs argued that this parody was immoral and thus unprotected by fair use. The court, in ruling for Dees on fair use, responded to this argument in stating, “Assuming without deciding that an obscene use is not a fair use . . . we conclude, after listening to it, that the parody is innocuous—silly perhaps, but surely not obscene or immoral.”¹⁹⁴ However, this response included a *but see* citation to the *Pillsbury v. Milky Way* opinion’s statements that an obscene use could be a fair use.¹⁹⁵ Perhaps the Ninth Circuit was not prepared to agree fully with Judge Mansfield on the Second Circuit and Judge O’Kelley on the U.S. District Court for the Northern District of Georgia that obscenity and immorality do not play a role in fair use analysis. At least the court acknowledged the argument.

Any litigation involving *Hustler Magazine* and the late, nationally-known, fundamentalist preacher Jerry Falwell and his Moral Majority is bound to be fascinating, and there is no doubt that the highly-charged dispute at issue in *Hustler Magazine v. Moral Majority* was not, by any means, a typical copyright infringement case. *Hustler* published a parody of a familiar (at that time) Campari liquor advertisement in its November 1983 and March 1984 editions.¹⁹⁶ The legitimate ads had interviews with famous people

189 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

190 *Fisher*, 794 F.2d at 434.

191 *Id.*

192 *Id.*

193 *Id.* at 434, 436 (noting the imitation of Mathis’s “rather singular vocal range”).

194 *Id.* at 437.

195 See *supra* notes 175–81 and accompanying text.

196 *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1149 (9th Cir. 1986).

about the “first time” they enjoyed Campari.¹⁹⁷ These recollections were full of double entendres about the subject’s “first time” with sex.¹⁹⁸ The *Hustler* parody had Reverend Falwell as the celebrity with his “first time” being “with his mother in an outhouse, and saying that he always gets ‘sloshed’ before giving his sermons.”¹⁹⁹ The pages in *Hustler* with this parody ad had a disclaimer saying that it was a parody and should not be taken seriously.²⁰⁰

Neither Campari nor its ad agency complained about this parody advertisement.²⁰¹ Instead, it was Jerry Falwell and the Moral Majority who responded. They sent out mailings to hundreds of thousands of supporters and donors that included a copy of the parody ad with some of the words redacted.²⁰² This mailing was to raise money to support Reverend Falwell’s suit against *Hustler Magazine*, publisher Larry Flynt and others, alleging libel, invasion of privacy, and intentional infliction of emotional distress.²⁰³ Reverend Falwell also displayed the parody ad on his television show.²⁰⁴ In response to this, *Hustler* sued Falwell and others for copyright infringement—reproducing the parody ad from Flynt’s magazine to raise money to support the Reverend’s suit against the evil pornographer and others.²⁰⁵

The district court ruled that *Hustler’s* ad was infringed but granted summary judgment for Falwell, holding that the mailings and the television displays were permissible under fair use.²⁰⁶ The Ninth Circuit affirmed in a 2–1 decision. The critical factors in the analysis were the purpose and character of Falwell’s use and the impact of this use on the

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1149–50.

¹⁹⁹ *Id.* at 1150.

²⁰⁰ *Id.*

²⁰¹ If they had complained, one would think that some courts would have ruled in *Hustler’s* favor, saying the ad was a parody within the fair use doctrine. *See, e.g.,* Pro Arts, Inc. v. Hustler Magazine, Inc., No. 85-3022, No. 85-3041, 1986 WL 16647 (6th Cir. 1986) (unpublished opinion). In *Pro Arts*, the plaintiff’s famous poster of Farah Fawcett was visible in a single-page advertisement soliciting subscriptions for *Slam Magazine* that appeared in both *Slam* and *Hustler*. *Id.* at *1. The theme of the ad was “Save This Child From the Seventies,” and the reproduction of the poster in the ad was about the size of a postage stamp and the ad also contained, among other things, the poster of John Travolta dancing in Saturday Night Fever. *Id.* All of this was seen as a parody of the culture of the 70s, and after all the factors were analyzed, this was determined to be a fair use. *Id.* at *2-3. *See also* Ochoa, *supra* note 28, at 617.

²⁰² *Hustler Magazine*, 796 F.2d at 1150.

²⁰³ The end result of this suit was the Supreme Court’s decision in *Hustler Magazine v. Falwell*, 485 U.S. 46, 47-48 (1988), in which it held that this highly offensive parody advertisement was protected by the First Amendment. *Id.* at 50-57.

²⁰⁴ *Hustler Magazine*, 796 F.2d at 1150.

²⁰⁵ *Id.* at 1150, n.1.

²⁰⁶ *Id.* at 1150.

market for the ad.²⁰⁷ The majority determined that even though the Moral Majority conceded that their use of copies of the ad was to raise money, it also was a form of criticism and comment; an individual's effort to rebut a copyrighted work that contained derogatory comments.²⁰⁸ "The court noted that 'the public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness.'"²⁰⁹ The majority also agreed with the trial court "that the effect on the marketability of back issues of the entire magazine is *de minimis* because it is only one page of a publication which would be purchased for 'its other attractions.'"²¹⁰ Also, Falwell's supporters in the Moral Majority and viewers of the *Old Time Gospel Hour* were not likely *Hustler* readers.²¹¹

In contrast, the dissenting judge wrote that Falwell went beyond commenting on the parody advertisement and

actively sought to exploit the emotional impact of the work to raise money. . . . The defendants published *Hustler's* parody in the hope of milking the possible indignation it would arouse for their own personal monetary benefit. This purpose weighs strongly against a conclusion that the defendants' use of the parody was a fair use.²¹²

The dissent also argued that if this kind of use became widespread, it would have an adverse impact on the potential market for *Hustler's* ad parody.²¹³

What are some safe generalizations about the parody as fair use decisions rendered between the mid-1950s and the late 1980s? First, most courts were willing to recognize that parody, as a form of comment and criticism, was worthy of protection under fair use. Second, there was disagreement on whether the defendant's use of the plaintiff's copyrighted work had to target or comment on that work in order to qualify as a parody. In addition, there was uncertainty whether parody should be distinguished as satire. Third, there seemed to be some disagreement on how much of a protected

²⁰⁷ *Id.* at 1151-52.

²⁰⁸ *Id.* at 1153.

²⁰⁹ *Id.* At this time, commercial uses were presumptively unfair. See *Sony Corp. v. Universal City Studios Inc.*, 464 U.S. 417, 449-51 (1984). The *Campbell v. Acuff-Rose, Inc. (Pretty Woman)*, 510 U.S. 569 (1994), decision eliminated the use of presumptions like this in fair use analysis.

²¹⁰ *Hustler Magazine*, 796 F.2d at 1156.

²¹¹ *Id.*

²¹² *Id.* at 1158 (Poole, J., dissenting).

²¹³ *Id.* at 1158-59 (explaining that distributing the copies of the entire parody to the public would fulfill the demand of the original). See generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 187 (2d ed. 1995) (saying that the Ninth Circuit's opinion in *Fisher v. Dees* was outstanding, but arguing that a different panel got it wrong in the *Hustler v. Moral Majority* and permitted as a fair use "an opportunistic, blatantly commercial exploitation of a tasteless parody advertisement").

work the defendant parodist was able to borrow in order to recall or conjure up that protected work. Fourth, it could be argued that some courts had ignored Justice Holmes' warning about the judging of the merit of a work in ruling against parodies that were obscene, pornographic or offensive.

C. THE Pretty Woman DECISION

The Supreme Court finally addressed parody as a fair use in 1994 in *Campbell v. Acuff-Rose Music, Inc.*,²¹⁴ the *Pretty Woman* decision, thirty-six years after it had affirmed, by an equally divided vote, the Ninth Circuit's decision that Jack Benny's satire *Autolight* infringed the copyright on the movie *Gas Light*.²¹⁵ "Pretty Woman" involved a rap version of the 1964 rock ballad by Roy Orbison and William Dees called "Oh, Pretty Woman."²¹⁶ The rap version, called "Pretty Woman," was written by Luther Campbell, performed and recorded by his group, 2 Live Crew, and released in an album entitled *As Clean As They Wanna Be*.²¹⁷ Campbell and his group sought permission from the copyright owner, Acuff-Rose Music, to do the parody version of "Oh, Pretty Woman," but the request was refused.²¹⁸ Nevertheless, the recording went on sale, almost a quarter of a million copies of it were sold within the first year, and then Acuff-Rose sued Campbell, 2 Live Crew and their record company for copyright infringement.²¹⁹

The defendants not only copied the characteristic opening bass riff of the original and "repeated it, but also produced otherwise distinctive sounds, interposing 'scraper' noise, overlaying the music with solos in different keys, and altering the drum beat."²²⁰ They also copied the opening line from Orbison's song but then their own words which "quickly degenerate[d] into a play on words, substituting predictable lyrics with shocking ones."²²¹ Here are some of the lyrics from both the original and the 2 Live Crew parody:

"Oh, Pretty Woman"
by Roy Orbison and William Dees

"Pretty Woman"
by 2 Live Crew

Pretty Woman, walking down

Pretty woman walkin' down

²¹⁴ *Campbell v. Acuff-Rose, Inc.* (*Pretty Woman*), 510 U.S. 569 (1994).

²¹⁵ *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.* *CBS v. Loew's, Inc.*, 356 U.S. 43 (1958); see *supra* notes 132-34 and accompanying text.

²¹⁶ *Pretty Woman*, 510 U.S. at 571-73.

²¹⁷ *Id.* at 572.

²¹⁸ *Id.* at 572-73.

²¹⁹ *Id.* at 573.

²²⁰ *Id.* at 589.

²²¹ *Id.* at 573 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154-55 (M.D. Tenn. 1991)).

the street,
 Pretty Woman, the kind I
 like to meet,
 Pretty Woman, I don't believe you,
 you're not the truth,
 No one could look as
 good as you
 Mercy
 Pretty Woman, won't you
 pardon me,
 Pretty Woman, I couldn't help
 but see,
 Pretty Woman, that you look
 lovely as can be
 Are you lonely just like me?

the street
 Pretty woman girl you look
 so sweet
 Pretty woman you bring me
 down to that knee
 Pretty woman you make me
 wanna beg please
 Oh, pretty woman
 Big hairy woman you
 need to shave that stuff
 Big hairy woman you know
 I bet it's tough
 Big hairy woman all
 that hair it ain't legit
 'Cause you look like
 'Cousin It'²²²

There are, of course, many more lines to both songs. The district court granted summary judgment for 2 Live Crew, saying that their song was a parody that showed the blandness and banality of the Orbison song, that it took no more than necessary to conjure up the original, and that it was unlikely to affect the market for the original; in other words, it was a fair use.²²³ However, the Court of Appeals for the Sixth Circuit, while assuming the 2 Live Crew song was a parody of Orbison's classic, reversed because the district court did not put enough emphasis on the fact that commercial uses are presumptively unfair and that harm to the market for the original could be presumed as well.²²⁴ Moreover, the parody had taken too much from the original.²²⁵

The Supreme Court reversed, holding that the Sixth Circuit erred in presuming this commercial use was unfair and that market harm could be presumed as well. "No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one."²²⁶ The Court also said that the Sixth Circuit erred in holding that 2 Live Crew had copied excessively "considering the parodic purpose of the use."²²⁷ The case was remanded for consideration of whether

²²² *Id.* at 594-96.

²²³ *Id.* at 573 (citing and quoting *Acuff-Rose Music, Inc. v. Campbell* 754 F.Supp. 1150, 1154-55, 1157-58 (M.D. Tenn. 1991)).

²²⁴ *Id.* at 573-74 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1435, 1437-39 (6th Cir. 1992)).

²²⁵ *Id.*

²²⁶ *Id.* at 594.

²²⁷ *Id.*

"repetition of the bass riff is excessive copying, and . . . to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution."²²⁸

The *Pretty Woman* decision is important for many reasons, and I want to emphasize those parts of Justice Souter's opinion that relate directly to this Article.²²⁹ First, the Supreme Court aligned itself with all the other "courts that have held that parody, like other comment or criticism, may claim fair use under § 107."²³⁰

Second, the Court said, for purposes of copyright law, that "the heart of any parodist's claim to quote from existing material, is the use of some element of a prior author's composition to create a new one that, at least in part, comments on that author's work."²³¹ In contrast, the claim to fairness diminishes (perhaps vanishes) when the alleged infringer's taking from another work has "no critical bearing on the substance or style" of that work.²³² In other words, the Court agreed with those courts who had said, "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."²³³ These statements should not, however, be taken to mean that satire cannot be a fair use. The Court acknowledged in a footnote that there may be situations where "taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required."²³⁴

Justice Kennedy, in a concurring opinion, however, expressed strong reservations about allowing the parody defense to "weaken the protection of copyright."²³⁵ He emphasized that to prevent this from happening the "definition of parody [must be kept] within proper limits. More than arguable parodic content should be required to deem a would-be parody a fair use."²³⁶ To him, this meant that "[t]he parody must target the original,

²²⁸ *Id.* at 589.

²²⁹ The Court was unanimous. *Id.* at 571. Justice Kennedy filed a concurring opinion. *Id.*

²³⁰ *Id.* at 579. The Court acknowledged that it first considered whether parody could be a fair use in *Benny v. Loew's*, 239 F.2d 532, but had not issued an opinion. *Id.*

²³¹ *Pretty Woman*, 510 U.S. at 580.

²³² *Id.* "If, on the contrary, the commentary has no critical bearing on the . . . original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing . . . another's work diminishes accordingly" *Id.*

²³³ *Id.* at 580-81.

²³⁴ *Id.* at 580-81 n.14; see Ochoa, *supra* note 28, at 581-82.

²³⁵ *Pretty Woman*, 510 U.S. at 599 (Kennedy, J., concurring).

²³⁶ *Id.*

and not just its general style, the genre of art to which it belongs, or society as a whole.”²³⁷ In other words, Justice Kennedy had more demanding requirements for parody than the other members of the Court. He might not be as tolerant of an appropriation that functioned as satire—a comment on society—that did not also comment on the protected work.

As for the 2 Live Crew rendition of “Pretty Woman,” the Supreme Court aligned itself with the district court and Judge Nelson, the dissenting judge in the Sixth Circuit, in saying that the 2 Live Crew song “‘was clearly intended to ridicule the white-bread original’” and that it

reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers . . . have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses.²³⁸

The Court also said that the song

juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.²³⁹

Third, after asserting that it could reasonably perceive the parodic character of 2 Live Crew’s song,²⁴⁰ the Court spoke directly to the whether courts should evaluate the quality of a parody:

Whether, going beyond that, the parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside the narrowest and

237 *Id.* at 597. Justice Kennedy added that if the parody targets the original, then it may target those other features as well. *Id.* Judge Posner has written that the parody defense should be available where the use of the copyrighted work “targets” that work, but not where the use of the copyrighted work is a “weapon” to comment on something else. Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 71 (1992).

238 *Pretty Woman*, 510 U.S. at 582. (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting)). Justice Kennedy wrote that he was “not so assured that 2 Live Crew’s song is a legitimate parody.” *Id.* at 599 (Kennedy, J., concurring).

239 *Id.* at 583 (majority opinion). This seems a little like Monday morning quarterbacking: post-hoc rationalizations for the parodic aspects of the song. However, this is the U.S. Supreme Court speaking about these attributes of 2 Live Crew’s song. As a guy who likes parody and satire, and who wants people to lighten up and laugh, I will say, “Yes, I can see that too.”

240 *Id.* at 582, 583.

most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”²⁴¹

This holding means that judgments as to whether a parody is tasteful or offensive have no place in a court’s determination about where to draw the line between infringement and fair use.²⁴² What might have happened fifty years ago if the Supreme Court had ruled in Jack Benny’s favor in the *Gas Light* versus *Autolight* case, held that his parody of the movie was a fair use, and repeated the familiar language from *Bleistein* that judges should not be evaluating the worth of the works at issue in their cases?

Of course, this is more speculation on my part because the Ninth Circuit holding that Benny had infringed the copyright was upheld, without opinion, by an equally divided Supreme Court. Still, it is fun to speculate as to whether *Air Pirates*, the *Happy Hooker/Mickey Mouse March* case, and *Boogie Woogie Bugle Boy* would have come out differently had there been a clear statement that Holmes’ admonition in *Bleistein* applies to fair use analysis as well as to deciding whether a particular work is copyrightable.

Did the judges who decided those cases allow their judgments to be influenced by the fact they regarded the challenged parodies as distasteful and obscene?²⁴³ It turns out that Judge Mansfield, who dissented in *Boogie Woogie Bugle Boy*, and Judge O’Kelley, who decided the Pillsbury/*Screw* magazine case, had it right. Both expressed distaste for the offending parodies, but both said that *Bleistein* prevented them from allowing their disgust to cloud their fair use analyses. Well, one can only speculate. The *Pretty Woman* decision did not draw a bright line between parody that falls within fair use and satire/parody that infringes, so there is plenty of room for advocacy on both sides of the equation.²⁴⁴

D. Post-Pretty Woman Decisions

There have been many fair use decisions rendered since *Pretty Woman* was decided in 1994, but only a few involve what most people would regard as offensive or distasteful uses of popular works, at least in my opinion.

Barbie, the iconic fashion doll manufactured by Mattel, Inc., has enjoyed tremendous commercial success since making her debut in 1959. She also

²⁴¹ *Id.* at 582-83 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

²⁴² See 4 NIMMER & NIMMER, *supra* note 123, at § 13.05[C][2].

²⁴³ “[I]s it even possible to observe the [Holmes] prescription faithfully?” JOYCE ET AL., *supra* note 5, at 97 n.4.

²⁴⁴ See generally 4 NIMMER & NIMMER, *supra* note 123, at § 13.05[C][2] (discussing the ramifications of the Supreme Court’s decision to remand the *Pretty Woman* case to the Sixth Circuit).

has been subject to many parodies, some not very flattering. For instance, Susanne Pitt sold a repainted and re-costumed Barbie-like doll with the head of Mattel's "SuperStar" Barbie; her doll was called "Dungeon Doll."²⁴⁵ Ms. Pitt also maintained a Web site with images of this repainted and re-costumed "SuperStar" Barbie in a sexually explicit story and offered sexual paraphernalia for sale.²⁴⁶ The story was titled *Lily the Diva Dominatrix*.²⁴⁷ This upset Mattel, so it sued and, after some procedural squabbles, moved for summary judgment.²⁴⁸ Ms. Pitt, a *pro se* defendant from the UK, raised fair use as a defense.²⁴⁹

The court denied Mattel's motion, explaining that the "patently transformative character of the accused works and Defendant's representations concerning their purpose support[ed] . . . the fair use defense."²⁵⁰ Pitt asserted that she was "attempting to comment on . . . the sexual nature of Barbie through her use of customized Barbie figurines in sadomasochistic costume and/or storylines."²⁵¹ There did not appear to be any doubt that Pitt's use commented on the copyrighted work—Barbie.

In ruling against Mattel, the district court relied upon *Pretty Woman* and other cases,²⁵² including another unsuccessful infringement action Mattel brought to protect Barbie against Tom Forsythe, a self-taught photographer.²⁵³ Forsythe "developed a series of 78 photographs entitled 'Food Chain Barbie,' in which he depicted Barbie in various absurd and often sexualized positions."²⁵⁴ In many of these Barbie is nude and "juxtaposed with vintage kitchen appliances."²⁵⁵ For instance, "MalTED Barbie" features Barbie nude inside a vintage Hamilton Beach malt machine, and "Barbie Enchiladas" has "four Barbie dolls wrapped in tortillas and covered with salsa in a casserole dish in a lit oven."²⁵⁶ Forsythe displayed his photos at several festivals and tried to market them in a variety of ways, but he enjoyed little commercial success prior to being sued by Mattel for copyright,

²⁴⁵ Mattel, Inc. v. Pitt, 229 F. Supp.2d 315, 318 (S.D.N.Y. 2002).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 322. The doll wore a "[l]ederhosen-style' Bavarian bondage dress and helmet in rubber with PVC-mask and waspie." *Id.*

²⁴⁸ *Id.* at 319.

²⁴⁹ *See id.* at 319-20.

²⁵⁰ *Id.* at 322-23.

²⁵¹ *Id.* at 322. The court analyzed the other fair use factors as well in concluding that there were serious questions as to whether her use of Barbie was a fair use. Accordingly, summary judgment could not be granted for Mattel. *Id.* at 323-25.

²⁵² *Id.* at 322-23 (citing Campbell v. Acuff-Rose Music, Inc. (*Pretty Woman*), 510 U.S. 569 (1994); Leibovitz v. Paramount Pictures, 948 F. Supp. 1214 (S.D.N.Y. 1996)).

²⁵³ *Id.* at 321 (discussing Mattel, Inc. v. Walking Mountain Prods., No. CV998543RSWL., 2001 WL 929923 (C.D. Cal. Aug. 13, 2001)).

²⁵⁴ Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 2003).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

trademark and trade dress infringement.²⁵⁷ Forsythe eventually moved for summary judgment. The district court granted the motion, ruling that his photographs of Barbie were fair use.²⁵⁸ The Ninth Circuit affirmed.²⁵⁹

The court had no difficulty concluding that Forsythe's work could be reasonably perceived as a parody and noted that whether "a parody is in bad taste is irrelevant to whether it constitutes fair use."²⁶⁰ It pointed out that Barbie had become, thanks to Mattel's marketing, "the ideal American woman" and a "symbol of American girlhood" associated with "beauty, wealth, and glamour."²⁶¹ Moreover, the image of Mattel's doll was a target of Forsythe's parody:

Forsythe turns this image on its head, so to speak, by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations. His lighting, background, props, and camera angles all serve to create a context for Mattel's copyrighted work that transform Barbie's meaning. Forsythe presents the viewer with a different set of associations and a different context for this plastic figure. In some of Forsythe's photos, Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society.²⁶²

If posing Barbie nude in sexually suggestive positions with kitchen appliances and dressing her as a dominatrix in a lederhosen-style bondage dress and a rubber helmet are fair uses, then there is not much Mattel can do to protect her virtue. Things are tough for Barbie and Mattel. Mattel was, however, victorious against a doll called "Claudene" with blonde hair and blue eyes, dressed like a Southern California cheerleader, who infringed Mattel's rights to "Cool Blue" Barbie, but parody was not an issue.²⁶³

²⁵⁷ *Id.* at 797 n.2.

²⁵⁸ *Id.* at 798. The court also held that his use of Mattel's trademark and trade dress did not cause "likelihood of confusion." *Id.* A dilution claim was dismissed because Forsythe's use was "noncommercial," and the state law claims "failed as a matter of law." *Id.*

²⁵⁹ *Id.* at 816.

²⁶⁰ *Id.* at 801 (quoting *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 582-83 (1994) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903))).

²⁶¹ *Id.* at 802 (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 898 (9th Cir. 2002)).

²⁶² *Id.* The photos "parody Barbie and everything Mattel's doll has come to signify." *Id.* The court also concluded that Forsythe's use of the Barbie mark and trade dress was not infringing or diluting. *Id.* at 812.

²⁶³ See *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1121 (9th Cir. 2003). The maker of Claudene sued Mattel for infringement. *Id.* Mattel counterclaimed, won on summary judg-

Recently, Mattel was successful in an infringement claim against MGA Entertainment, the maker of the Bratz dolls. A trial court ruled that these “popular, pouty-lipped dolls” infringed Mattel’s copyrights on Barbie.²⁶⁴ Mattel also had partial success in asserting that Radio City Entertainment’s “Rockettes 2000 Doll” infringed its “Neptune’s Daughter Barbie Doll” and its “CEO Barbie Doll.” The trial court granted summary judgment for the defendant, saying that the similarities between the dolls arose from non-copyrightable elements.²⁶⁵ “When it comes to something as common as a youthful, female doll, the unprotectible [sic] elements are legion”²⁶⁶ The court of appeals did not agree. It explained that even though the doll’s facial features—eyes, nose and mouth—were standard and common, this did not remove Mattel’s portrayal of those features from the realm of copyright protection.²⁶⁷ Mattel “is entitled by its copyright not to have its design copied by competitors.”²⁶⁸ The court of appeals vacated and remanded for a determination of whether the defendant copied Barbie’s features.²⁶⁹ Here, again, parody was not an issue.

Parody was raised in Mattel’s unsuccessful suit against music companies whose song “Barbie Girl,” performed by the Danish band *Aqua*, lampooned Barbie. The court ruled that the use of the “Barbie” mark in the song did not infringe Mattel’s trademark and that the song itself fell under the non-commercial use exception in the Federal Trademark Dilution Act.²⁷⁰ The song poked fun at Barbie and the values she represents. Some of the lyrics state: “I’m a blonde bimbo girl, in a fantasy world/Dress me up, make it tight, I’m your dolly.”²⁷¹ The court cited *Rogers v. Grimaldi*, saying that the song targeted Barbie, and concluding that all of this constituted a permitted trademark parody use.²⁷²

I guess that the price of success for an icon like Barbie is that you will be the subject of parody and satire. As my late mother always said, “People will not poke fun at you unless they really like you.” Mattel should ignore the likes of Tom Forsythe and relish the fact Barbie is still being parodied as she turns fifty. What is next, Cougar Barbie?²⁷³

ment, and then moved successfully for sanctions under Rule 11. *Id.*

²⁶⁴ Rebecca Winters Keegan, *Something to Pout About*, TIME, Dec. 22, 2008, at 65.

²⁶⁵ Mattel, Inc. v. Radio City Entm’t, No. 00 CIV.6272 JSR., 2002 WL 1300265, at *1 (S.D.N.Y. 2002) (order granting summary judgment for plaintiff).

²⁶⁶ *Id.*

²⁶⁷ Mattel, Inc. v. Goldberger Doll Mfg. Co., 365 F.3d 133, 136 (2d Cir. 2004).

²⁶⁸ *Id.* at 136–37.

²⁶⁹ *Id.* at 137.

²⁷⁰ Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 902, 907 (9th Cir. 2002).

²⁷¹ *Id.* at 901.

²⁷² *Id.* at 901–02 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989)).

²⁷³ I recall seeing a Cougar Barbie cartoon spoof on YouTube right about the time she celebrated her fiftieth birthday. My wife and I laughed but I doubt Mattel thought it was

An icon of American comedy, Carol Burnett, was the target of a sexually suggestive satire in our post-*Campbell v. Acuff-Rose* world. More specifically, the “Charwoman” character created by Ms. Burnett in the long running *The Carol Burnett Show*²⁷⁴ was depicted in an episode of *Family Guy*, the animated comedy series aimed at mature audiences.²⁷⁵ The episode in question, titled “Peterotica,” has the family patriarch, Peter Griffin, entering a porn shop, remarking about the cleanliness of the place, and learning from his friend that “Carol Burnett works part time as a janitor.”²⁷⁶ The viewer then sees “an animated figure resembling the ‘Charwoman’ from the Carol Burnett Show, mopping the floor next to seven ‘blow-up dolls,’ a rack of ‘XXX’ movies, and a curtained room with a sign above it reading ‘Video Booths.’”²⁷⁷ During this scene, “a version of Carol’s Theme from the *Carol Burnett Show*,” can be heard while Peter and his friends make a suggestive joke about the fact that Ms. Burnett used to tug her ear at the end of the show.²⁷⁸

The plaintiffs’ multiple-count complaint included a copyright infringement claim. Defendants raised fair use, and Burnett argued that the *Family Guy* episode was neither transformative nor a parody, but the court concluded otherwise. It found that four factors in 17 U.S.C. § 107 “weigh heavily in favor of a finding of fair use and that plaintiffs’ first claim of relief for copyright infringement should be dismissed without leave to amend.”²⁷⁹ The court explained:

[I]t is immaterial whether the target of Family Guy’s “crude joke” was Burnett, the Carol Burnett Show, the Charwoman, Carol’s Theme Music or all four. The eighteen-second clip of the animated figure resembling the “Charwoman,” . . . is clearly designed to “imitate [] the characteristic style of an author or a work for comic effort or ridicule” and is executed in such

funny. I would not, however, recommend that they sue for infringement. On the other hand, if there is a Barbie knock-off on the market, that arguably takes too much of Mattel’s protected expression and hurts their market share, then Mattel should sue for infringement. This is illustrated by Mattel’s suit against MGA Entertainment, Inc. over their competing doll, Bratz. Mattel alleged that Bratz was conceived while its designer worked for Mattel. Bratz is a key competitor for Barbie, and Barbie is Mattel’s biggest brand. See Edvard Pettersson and Heather Burke, *Mattel Says It Has Proof Bratz Was Born in Barbie’s Family*, DAILY REPORT (Fulton County, GA), May, 14, 2008, Business Matters. As pointed out above in *Barbie*, Barbie eventually won against the Bratz dolls. See Keegan, *supra* note 264.

274 *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 966 (C.D. Cal. 2007).

275 See Anandashankar Mazumdar, *Cartoon Showing Carol Burnett Character Cleaning in Porn Shop Protected as Fair Use*, 74 PAT., TRADEMARK & COPYRIGHT J. 240 (2007).

276 *Burnett*, 491 F. Supp. 2d at 966.

277 *Id.*

278 *Id.* The total clip lasted eighteen seconds. *Id.* at 970.

279 *Id.* at 971.

a manner that “the characteristic turns of thought and phrase or class of authors are imitated in such a way as to make them appear ridiculous.” . . . Here, Family Guy put a cartoon version of Carol Burnett/the Charwoman in an awkward, ridiculous, crude, and absurd situation in order to lampoon and parody her as a public figure. Therefore, the Court finds that a parodic character may reasonably be perceived in the Family Guy’s use of the Charwoman because it is a “literary or artistic work that broadly mimics an author’s characteristic style and holds it up to ridicule”²⁸⁰

Ms. Burnett’s trademark infringement and dilution claims under the Lanham Act also were dismissed, and the court declined to exercise supplemental jurisdiction over her state law claims.²⁸¹ The court stated in conclusion that it

fully appreciates how distasteful and offensive the segment is to Ms. Burnett. Debasing the “Charwoman” and also making Ms. Burnett’s parents participants in a crude joke is understandably disheartening to Ms. Burnett, her family, and many fans. To some extent this dispute is indicative of just how far the “new media” has come from the “old media.” . . . [W]hen crude jokes and insensitive, often mean spirited, programming was perhaps found in live night club performances, but was not present on television. In the new media, any self[-]imposed restraint essentially has been eliminated. . . . As Ms Burnett well knows, it takes far more creative talent to create a character such as the “Charwoman” than to use such characters in a crude parody. Perhaps Ms. Burnett can take some solace in that fact.²⁸²

I have laughed at *Family Guy*, and I have laughed at Carol Burnett. I do not think any less of her talents and the quality of her comedy routines because of a parody like “Peterotica.” Here, the court got it right as this was fair use. Parodies will remain a fertile ground for litigation, and I predict that a true parody spoof will be on the winning side much more often than not because of the *Pretty Woman* decision, the vitality of the *Bleistein* principle of aesthetic non-discrimination, and recognition by the courts that “the public benefit in allowing artistic creativity and social criticism to flourish is great.”²⁸³

²⁸⁰ *Id.* at 968-69 (quoting *Campbell v. Acuff Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 580 (1994); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997)).

²⁸¹ *Id.* at 974-75.

²⁸² *Id.* at 974. The cartoon show routinely puts cartoon versions of celebrities in awkward situations in fictional Quahog, Rhode Island “in order to lampoon and parody those public figures and to poke fun at society’s general fascination with celebrity and pop culture.” *Id.* at 966.

²⁸³ *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003); see *Mastercard Int’l v. Nader 2000 Primary Comm. Inc.*, 70 U.S.P.Q.2d (BNA) 1046, 1058 (S.D.N.Y.

There are, however, several troubling post-*Pretty Woman* decisions that illustrate difficulties applying the Supreme Court's definition of parody that requires the defendant parodist, in making use of another author's copyrighted material, to comment on or target that author's work.²⁸⁴ "If . . . the commentary has no critical bearing on the substance or style of the original composition . . . the claim to fairness in borrowing from another's work diminishes accordingly"²⁸⁵ Deciding whether a defendant's spoof targets the copyrighted work that he or she used is not as easy as it sounds.²⁸⁶ These troubling post-*Pretty Woman* decisions are discussed in the next section.

III. IS IT A PARODY? RISKS IN DETERMINING THE TARGET OF THE SPOOF

The Supreme Court in *Pretty Woman* agreed with those courts which had said that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination."²⁸⁷ For purposes of copyright law, "the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."²⁸⁸ In contrast, the claim to fairness diminishes (perhaps vanishes) and the other fair use factors "loom larger" when the alleged infringer's taking from another work has "no critical bearing on the substance or style" of that work, and it is apparent that the alleged infringer used it "to get attention or to avoid the drudgery in working up something fresh."²⁸⁹

These statements do not mean that a satire that borrows from a protected work without commenting upon it will never be a fair use,²⁹⁰ but the Court also said that a "satire can stand on its own two feet and so requires justification for the very act of borrowing."²⁹¹ The comment on

2004) (the candidate's TV ads played off Mastercard's very successful "Priceless" ads in criticizing other candidates but also commented on the original and were parodies).

284 *Campbell v. Acuff-Rose Music Inc. (Pretty Woman)*, 510 U.S. 569, 580-81 (1994); *see id.* at 599-600 (Kennedy, J., concurring).

285 *Id.* at 580 (majority opinion).

286 *See Suzor, supra* note 31, at 239.

287 *Pretty Woman*, 510 U.S. at 580-81.

288 *Id.* at 580.

289 *Id.* "If, on the contrary, the commentary has no critical bearing on the . . . original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing another's work diminishes accordingly" *Id.*; *see Biscaglia, supra* note 30, at 23-29 (explaining why a parody must criticize or comment on the source text).

290 *See Pretty Woman*, 510 U.S. at 580-81 n. 14-15; *see also Ochoa, supra* note 28, at 581-82.

291 *Pretty Woman*, 510 U.S. at 581.

the original requirement and the distinction between parody and satire²⁹² present a hurdle of uncertain height for the alleged infringer who is arguing that his or her spoof of the plaintiff's work is a parody.²⁹³ A rationale for requiring the copied work to be an object of the parody is an insistence

that the audience be aware that underlying the parody there is an original and separate expression attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.²⁹⁴

It seems that this rationale should work as well for a satire that uses some aspects of a familiar work to make a comment on society.

Notwithstanding the Supreme Court's quotation of the Holmes warning from *Bleistein* about not judging the worth of a work, and its statement that "whether . . . parody is in good taste or bad does not and should not matter to fair use,"²⁹⁵ a court can easily make an inappropriate artistic judgment when it has to determine whether a challenged spoof or take-off criticizes or comments on the original.²⁹⁶ How does one decide whether a spoof or take-off is a true parody or a satire? How easy is it to determine whether or not the original work is the target of the spoof? Even Judge Posner, who has written that the parody defense should be available only where the target of the parody is the copyrighted work, admits that the parody/satire distinction has problems.²⁹⁷

Some of the decisions before *Pretty Woman*, where the defendant's fair use defense ran into problems because the alleged parody was not seen as targeting or commenting on the plaintiff's copyrighted work, include *Mature Pictures* (the *Happy Hooker*/Mickey Mouse March case), *Air Pirates*,

²⁹² The Court turned to dictionaries for definitions of satire: "a work 'in which prevalent follies or vices are assailed with ridicule' . . . or are 'attacked through irony, derision, or wit.'" *Pretty Woman*, 510 U.S. at 581 n. 15.

²⁹³ If Justice Kennedy had his way, this hurdle would be even higher. "The parody must target the original," according to his concurring opinion in *Pretty Woman*. *Pretty Woman*, 510 U.S. at 597 (Kennedy, J., concurring); see *supra* notes 234-37 and accompanying text.

²⁹⁴ *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

²⁹⁵ *Pretty Woman*, 510 U.S. at 582-83.

²⁹⁶ See Robert P. Merges, *Are You Making Fun of Me: Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 312 (1993); Ochoa, *supra* note 28, at 592-93 (arguing that the Ninth Circuit allow its views on artistic merits to affects its judgment in the *Dr. Seuss* case); JOYCE ET AL., *supra* note 5, at 794 n.9.

²⁹⁷ Posner, *supra* note 237, at 69-71 (contrasting parodies to spoofs that use the copyrighted work as a weapon to comment on something else); see Merges, *supra* note 296, at 311; Ochoa, *supra* note 28, at 596-97 (discussing problems with the 'weapon' versus 'target' distinction); Suzor, *supra* note 31, at 238-39; Bisceglia, *supra* note 30, at 29 (courts will have to decide "difficult questions about the relationship between a parody and its source text").

Unlimited Monkey Business (Super Stud singing telegrams) and *MCA v. Wilson* (the *Boogie Woogie Bugle Boy* case).²⁹⁸ In each of these cases, a reasonable argument can be made that the sexually explicit, obscene or distasteful use of the plaintiff's work did, in fact, comment on or target the copyrighted work and should have been regarded as a parody.²⁹⁹ After all, if the intent to ridicule the "white-bread original" was so clear in *Pretty Woman*,³⁰⁰ then Judge Mansfield must have had it right in his *Boogie Woogie Bugle Boy* dissent when he wrote that the *Cunnilingus Champion* song put a "humorous twist on the more conventional Bugle Boy and by parodying the Andrews Sisters' style, which depended heavily on 'boogie-woogie' music."³⁰¹ The dirty lyrics were irrelevant to him but they seemed to affect the trial court's and the Second Circuit's ruling that the "song was neither a parody or burlesque of Bugle Boy nor a humorous comment on the music of the '40s."³⁰² Most of the judges in these cases let their disgust about dirty lyrics and obscenity color their analysis, and, at best, they seemed to pay lip service to the principle Holmes announced in *Bleistein*.³⁰³

Rogers v. Koons is another example of the impact of the "comment on the original" requirement.³⁰⁴ Art Rogers took a photograph of a husband and wife holding a litter of eight German Shepherd puppies. His photo was exhibited at the San Francisco Museum of Modern Art, prints were sold, and the photo was made into a postcard.³⁰⁵ The appropriation artist Jeff Koons had artisans reproduce this postcard as closely as possible in three-dimensional form as a wooden sculpture. It was copied faithfully³⁰⁶ and the sculpture was painted in bold colors. He exhibited this piece at his "Banality Show," sold three copies to collectors, and kept one for himself.³⁰⁷

298 Jack Benny's spoof of the movie *Gaslight* arguably failed on similar ground; it was not really a parody, but a comic adaptation of the original play. Ochoa, *supra* note 28, at 572 n.150.

299 See Biscceglia, *supra* note 30, at 29-32; Bernstein, *supra* note 143, at 39 (criticizing the result in *Mature Pictures*).

300 *Pretty Woman*, 510 U.S. at 582.

301 *MCA, Inc. v. Wilson*, 677 F.2d 180, 188 (Mansfield, J., dissenting).

302 *Id.* at 185 (quoting *MCA, Inc. v. Wilson*, 425 F. Supp. 443, 453 (D.C. N.Y. 1976)); see Biscceglia, *supra* note 30, at 29-32 (discussing the obscenity problem with parody and questioning the results in the *Air Pirates*, *Boogie Woogie Bugle Boy* and *Mickey Mouse March* cases).

303 Cf. Biscceglia, *supra* note 30, at 30-32.

304 *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); see Suzor, *supra* note 31, at 239 (highlighting "the somewhat arbitrary distinction that US courts have drawn between parodies and satires"). See generally Arthur, *supra* note 31 (analyzing, in depth, *Rogers v. Koons*); Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 460-61 (2008).

305 *Rogers v. Koons*, 751 F. Supp. 474, 475 (S.D.N.Y. 1990), *aff'd* by 960 F.2d 301 (2d Cir. 1992).

306 Arthur, *supra* note 31, at 113.

307 *Rogers*, 960 F.2d at 304-05.

All of this was done without the permission of the photographer who sued for infringement and won.³⁰⁸

Koons argued that his work was a fair use because it served as a critique of the mass production of commodities and media images and as a comment on our political and economic system.³⁰⁹ Ultimately, these contentions failed, as the trial court did not see the Koons sculpture as making any kind of criticism or comment on Rogers' photograph. It simply was an unauthorized appropriation to a different medium.³¹⁰ The Second Circuit agreed, stating "though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody."³¹¹ Koons' sculpture could be viewed as a satire critiquing "our materialistic society," but the court did not see any parody of Rogers' photograph.³¹² In a nutshell, perhaps there was a satirical comment in Koons' sculpture that faithfully copied the plaintiff's photograph, but the parodic character of it was not readily apparent to the courts and, in all likelihood, it would not have been apparent to the viewing audience.³¹³

The sculpture was not a parody and the satire argument might have been a stretch. The copying of protected expression was very substantial, and the court viewed Koons' sculpture as an unauthorized derivative work that injured Rogers' market for three-dimensional versions of his photograph. "[T]he copies [Koons and his artisans] produced bettered the price of the copied work by a thousand to one," and Koons thought he could get away with this appropriation because he was a major player in the art world while Rogers was not well known.³¹⁴ Thus, the fourth fair use factor also cut against Koons.³¹⁵ Perhaps the courts disliked appropriation art and this colored their analysis,³¹⁶ but the fair use factors weighed against

308 *Id.* at 305.

309 *Id.* at 309. This is not a far-fetched argument. Koons, like Warhol and Lichtenstein, took something relatively ordinary (the photo of the couple holding the puppies) and presented it in such a way that he calls attention not to the photo, but to the viewers' attitudes about what is and is not art. These artists "criticize our tendency to imagine that artistic value inheres in objects themselves, rather than in the way we choose to regard them." Bisceglia, *supra* note 30, at 8, 32.

310 *Koons*, 751 F. Supp. at 479.

311 *Rogers*, 960 F.2d at 310.

312 *Id.* at 310-11; see *Koons*, 751 F. Supp. at 479 (Koons' work did not comment on Rogers' photo, it appropriated the photo).

313 *Rogers*, 960 F.2d at 310 ("By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression attributable to a different artist."); see Ochoa, *supra* note 28, at 593; Heymann, *supra* note 304, at 460.

314 *Rogers*, 960 F.2d at 303.

315 *Id.* at 312; see Zissu, *supra* note 31, at 407.

316 See Arthur, *supra* note 31, at 116-17.

Koons.³¹⁷ Parody or satire, I think there is no doubt that he had infringed.

O.J. Simpson's double-murder trial inspired a story written in the distinctive rhyming style of Dr. Seuss with illustrations similar in style to those in a Dr. Seuss book. This illustrated story resulted in a troubling post-*Pretty Woman* decision from the Ninth Circuit. In doing so, the court quotes the beginning of the story:

A happy town
Inside L.A.
Where rich folks play
The day away.
But under the moon
The 12th of June.
Two victims flail
Assault! Assail!
Somebody will go to jail!
Who will it be?
Oh my! Oh me!³¹⁸

The entire book was written in this style, and it was held not to be a fair use.³¹⁹ The defendant's work, titled *The Cat NOT in the Hat!*, by Dr. Juice, was seen as a creative general satire, but the trial court found that it failed to comment on the text or theme of plaintiff's famous *The Cat in the Hat*.³²⁰ The court stated, "Only when the satirist wishes to parody the copyrighted work itself does the taking of protected expression from that work become permissible, and even then, only in such amounts as is required to fulfill the parodic purpose."³²¹ The Ninth Circuit affirmed. The court held that the defendant's book "simply [retold] the Simpson tale" without any "effort to create a [new] transformative work."³²²

This decision is wrong. The parodic character could be reasonably perceived in both the rhyming "Dr. Seuss" style in which the story was written, and in the creative graphics that mimicked "Dr. Seuss" graphics. Just like the 2 Live Crew rendition of *Pretty Woman*, *The Cat NOT in the Hat!* commented on the "naiveté of the original."³²³ Moreover, a finding

³¹⁷ *Id.* at 125-28.

³¹⁸ *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997).

³¹⁹ *Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc.*, 924 F. Supp. 1559, 1561-62 (S.D. Cal. 1996), *aff'd* 109 F.3d 1394 (9th Cir. 1997).

³²⁰ *Dr. Seuss*, 924 F. Supp. at 1567-69.

³²¹ *Id.* at 1568.

³²² *Dr. Seuss*, 109 F.3d at 1401. *See generally* Ochoa, *supra* note 28, at 589-620 (criticizing almost all aspects of the decision).

³²³ Ochoa, *supra* note 28, at 591; *see*, Suzor, *supra* note 31, at 240; *cf.* R. Anthony Reese,

of fair use could have been justified even if the work is treated as a satire because it was transformative in that it built on the distinct Dr. Seuss style of graphics and writing to create something new, and it is difficult to see how the defendant's work could have hurt the market for or value of the works of Dr. Seuss.³²⁴ Contrary to the lessons of *Bleistein* and *Pretty Woman*, the Ninth Circuit "allowed its own views concerning the artistic merits of the work to color its judgment."³²⁵

On the other hand, there are several post-*Pretty Woman* cases in which courts had little difficulty finding spoofs to be fair use parodies. For instance, during Ralph Nader's 2000 run for the White House, his campaign ran a television ad that mimicked MasterCard's very successful "Priceless" ads while criticizing his opponents. This fair use of MasterCard's protected work was seen as "comment[ing] on the craft of the original" and thus a parody.³²⁶ In another case, a line of dog chew toys and beds used the name "Chewy Vuitton" and the C/V logo of high-end fashion designer Louis Vuitton. The court said this was "an obvious wordplay on the name Louis Vuitton, and the superimposed C and V on the logo are intended to 'conjure up' enough of the Louis Vuitton logo in order to make the object of its wit—a humorous play on Louis Vuitton's high-end image in the form of dog toys—recognizable."³²⁷ The court concluded that this play on the Vuitton name and logo was a parody and fair use.³²⁸

Similarly, a movie poster for *Naked Gun 33-1/3* with the head of Leslie Nielsen superimposed on a photo of a very pregnant nude woman, posed just as Annie Leibovitz posed Demi Moore for the cover of *Vanity Fair*, was held to be a fair use.³²⁹

Plainly, the ad adds something new and qualifies as a "transformative" work. Whether it "comments" on the original is a somewhat closer question. Because the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original.

Transformativeness and the Derivative Work Right, 31 COLUM. J.L. & ARTS 467, 472-73, 492 (2008) (defendant had "altered the content of the original work and offered a different message, but these changes were not transformative because they did not produce a parody").

324 Cf. Suzor, *supra* note 31, at 240-41; Heymann, *supra* note 304, at 462-63 ("[T]he plaintiff's . . . work had indeed been 'transformed.'").

325 Ochoa, *supra* note 28, at 592.

326 Mastercard Int'l Inc. v. Nader 2000 Primary Comm., No. 00 Civ.6068(GBD), 2004 WL 434404, at *13 (S.D.N.Y. 2004).

327 Louis Vuitton Malletier SA v. Haute Diggity Dog, LLC, 464 F. Supp. 2d 495, 507 (E.D. Va. 2006), *aff'd* 507 F.3d 252 (4th Cir. 2007).

328 *Louis Vuitton*, 464 F. Supp. 2d at 507 (noting that Louis Vuitton does not participate in the market for pet chew toys and beds and offered no evidence of interference with potential markets or control of its copyrights).

329 Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 111-12 (2d Cir. 1998).

The contrast achieves the effect of ridicule that the Court recognized in *Campbell* would serve as a sufficient “comment” to tip the first factor in a parodist’s favor.³³⁰

The court expressed some “concern about the ease with which every purported parodist could win . . . simply by pointing out” how his or her work differs from the original, and noted that being different does not necessarily comment on the original.³³¹ Still, the differences between the movie poster and the plaintiff’s magazine cover might be seen as ridiculing the “undue self-importance conveyed by the subject of the Leibovitz photograph” and “as interpreting the . . . photograph to extol the beauty of the pregnant female body, and, rather unchivalrously, to express disagreement with this message.”³³² The court found a parody—or was it really a satire?³³³

Are these statements about the movie poster simply post-hoc rationalizations for justifying fair use? Are they more convincing than the explanation offered by Jeff Koons for his appropriation of the photograph of the couple holding the litter of puppies?³³⁴ Is the movie poster’s parody of Leibovitz’s *Vanity Fair* cover that much more evident than Dr. Juice poking (or not poking) fun at the unique style of a Dr. Seuss book’s verse and illustrations? Was Nader’s spoof of MasterCard’s “Priceless” ad campaign really a comment on the craft and style of the original? The alleged infringers in these cases made plausible arguments that what they did with their several plaintiffs’ works were legitimate parodies that targeted or commented on those plaintiffs’ original works. Whether the targeting or commenting on the original requirement is satisfied, however, depends too much on eyes and ears of the judges.³³⁵ Outcomes of cases should not turn on a judge’s determination of whether a challenged spoof or take-off does or does not comment on the original because the parody/satire distinction is squishy³³⁶ and because of the considerable risk of contravening *Bleistein*’s principle of aesthetic nondiscrimination.

It is doubtful that the Supreme Court will have the opportunity

330 *Id.* at 114; see *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 597-600 (1994) (Kennedy, J., concurring).

331 *Leibovitz*, 137 F.3d at 114.

332 *Id.* at 114-15. The court also said that a photographer who poses a well known actress in a manner that evokes Botticelli’s “Birth of Venus” should expect to have a parodist ridicule the photo. *Id.* at 111.

333 *Id.* at 1223 (promoting a movie that was itself a satire).

334 *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992); see *supra* notes 304-17 and accompanying text.

335 See Heymann, *supra* note 304, at 453-57. A persuasive argument has been made that the inquiry should shift to the readers and viewers—do they perceive of interpret the challenged use as adding something new, as being transformative.

336 See *supra* Part III and *infra* notes 371-92 and accompanying text.

to reconsider the wisdom of the “comment on the copyrighted work” requirement or target requirement from *Pretty Woman* unless it were to grant certiorari on some fair use/parody decision that worked its way through the federal courts. That seems unlikely. Nevertheless, the target/comment on the original hurdle may have become, like some scholars regard “transformativeness,” a worthy but failed effort at avoiding careful fair use analysis.³³⁷

IV. SATIRE AS FAIR USE

So what is to be done? Courts could pay lip service to the targeting the original requirement by routinely finding that the challenged spoof or take-off is a parody and then proceed to a traditional four-factor, fair use analysis. This approach might have resulted in a different outcome in the *Dr. Juice* and *Boogie Woogie Bugle Boy* cases but not in *Rogers v. Koons*. Treating every spoof as a parody, however, seems to ignore Justice Kennedy’s concurring opinion from *Pretty Woman* in which he said that copyright protection is harmed if any weak transformation of a work is allowed to qualify as a parody.³³⁸ On the other hand, I doubt that there are many who would like to see satirists like Mark Russell or The Capitol Steps held liable for copyright infringement because their comedy routines, changing the lyrics to popular songs to poke fun at politics, politicians, current events and the like, fail to target or comment on those popular songs. These are creative, transformative satires, and it is a stretch to say that they are parodies.³³⁹

Perhaps some composers and lyricists are offended by having entertainers and social/political commentators use their melodies and alter their lyrics for the purpose of poking fun at President Obama or Secretary of State Clinton or Senator Specter or Rush Limbaugh, but I am sure some do not care. Such imitations are a form of flattery, laughter is good for all of us, and, in my opinion, it is difficult to see how these satirists’ versions of popular songs impact the market for or value of those songs.³⁴⁰ Moreover, even though “transformativeness” is a fuzzy concept, it is reasonable to argue that the things The Capitol Steps and Mark Russell do with popular songs

337 See JOYCE ET AL., *supra* note 5, at 818 n.2-4 (discussing the difficulties associated with determining whether a particular use is transformative); cf. Reese, *supra* note 323 (discussing judicial confusion with fair use and derivative works resulting from the concept of “transformativeness”—a derivative work is one that transforms the underlying work so does the fair use concept of transformativeness weaken the derivative work right).

338 *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 599 (Kennedy, J., concurring) (expressing the need for commentary on the original and says that “doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist”).

339 Cf. 4 NIMMER & NIMMER, *supra* note 123, at §13.05[C][3].

340 See Suzor, *supra* note 31, at 240-41 (doubting that a copyright owner is any more likely to license use of his or her work for a satire than a parody).

are transformative uses. These satirists can make strong fair use arguments even if their renditions of popular songs do not qualify as parodies because they fail to target or comment on those songs.³⁴¹ They have strong precedents to support this argument. If the *Mad Magazine* lyrics in that publication's "sung to the tune of" versions of popular copyrighted songs were held to be fair uses in 1964, then the lyrics Mark Russell and The Capitol Steps sing today to the tune of popular songs should be fair uses of those songs.³⁴² The Second Circuit stated in that venerable *Mad Magazine* decision that "parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."³⁴³

The Supreme Court's decision in *Pretty Woman* stated, "Parody needs to mimic an original to make its point, and, so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on it own two feet and so requires justification for the very act of borrowing."³⁴⁴ The Court went with the standard definition of satire as a work "in which prevalent follies or vices are assailed with ridicule or are attacked through irony, derision, or wit."³⁴⁵ The Court did not, however, say that a satire could not qualify as fair use.³⁴⁶ Rather, satire can be a fair use. Like parody, satire is a form of criticism and comment; both are listed in § 107's preamble as examples of uses of copyrighted works which may be fair.³⁴⁷

The use of a photograph as part of a collage was treated as satire and held to be fair use in a decision involving the artist Jeff Koons; the oft-sued appropriation artist who had been unsuccessful in asserting parody as a defense in litigation in the early 1990s concerning works displayed in his Banality Show.³⁴⁸ Koons was commissioned by Deutsche Bank and the Guggenheim Foundation to produce a series of works titled "Easyfun-Ethereal."³⁴⁹ One of his works, "Niagara," was a collage in which he appropriated a fashion photograph by Andrea Blanch titled "Silk Sandals by Gucci."³⁵⁰ This photo had been published in the fashion magazine *Allure*,

341 See Heymann, *supra* note 304, at 461-62 (a defendant satirist's recontextualizing of an iconic work can be transformative because it allow the reader/viewer to see the old work in a new and different way); cf. Reese, *supra* note 323, at 492 (the courts in *Dr. Seuss* seemed to conclude that the changes were not transformative because they did not produce a parody).

342 *Berlin v. E.C. Publ'ns., Inc.*, 329 F.2d 541, 543 (2d Cir. 1964).

343 *Id.* at 545 (emphasis added).

344 *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 580-81 (1994).

345 *Id.* at 581 n.15.

346 *Id.* at 592 n.22.

347 17 U.S.C. § 107 (2006).

348 *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006) (discussing the artist's previous lawsuits for copyright infringement); see *supra* notes 304-17 and accompanying text.

349 *Blanch*, 467 F.3d at 247.

350 *Id.* at 248.

and it depicted, at close range, “a woman’s lower legs and feet, adorned with bronze nail polish and glittery Gucci sandals, resting on a man’s lap in what appeared to be a first-class airplane cabin.”³⁵¹ “Niagara,” like the other collages in Koons’ series, used images from advertisements or his own photographs that he digitally superimposed against pastoral scenes. “Niagara” is made up of four pairs of women’s feet and lower legs dangling over images of sweets—confections like fudge brownies and donuts—with Niagara Falls and a grassy field in the background.³⁵² One of those pairs of legs was derived from Blanch’s photograph.³⁵³ Koons scanned the photo’s image but made several changes when he placed it in his collage, including inverting the orientation of the legs, eliminating the airplane cabin and the man’s lap, and modifying the colors.³⁵⁴ He did this reproduction and modification without permission of Blanch or *Allure*’s publisher.³⁵⁵

Blanch’s suit claimed copyright infringement, but the district court concluded that Koons’ use of “Silk Sandals” in “Niagara” was fair use.³⁵⁶ It regarded this as a transformative use, worked through all the fair use factors, and concluded that the plaintiff’s photograph could not have captured the market occupied by “Niagara.”³⁵⁷

The Second Circuit affirmed the decision. It also went through a very thorough, traditional, factor-by-factor, fair use analysis of Jeff Koons’ unauthorized use of Blanch’s “Silk Sandals by Gucci.”³⁵⁸ After an extended discussion of fair use and the *Pretty Woman* decision,³⁵⁹ the court said it was undisputed that Koons used Blanch’s photograph as “fodder for his commentary on the social and aesthetic consequences of mass media. [Koon’s] . . . objective is thus not to repackage [it], but to employ it ‘in the creation of new information, new aesthetics, new insights and understandings.’”³⁶⁰ It

351 *Id.* The photographer said it was her idea to use the airplane interior as a backdrop and place the model’s feet on the man’s lap in order to “show some sort of erotic sense[;] . . . to get . . . more of a sexuality to the photographs.” *Id.*

352 *Id.* at 247. The legs are placed side by side, each pair pointing downward and extending from the top of the collage about two-thirds of the way to the bottom. Koons said that this collage was inspired by a billboard he saw in Rome that depicted several sets of women’s legs. *Id.*

353 *Id.*

354 *Id.*

355 *Id.* *Allure* is a Conde Nast publication. *Id.* Koons received \$2 million for his seven paintings in the series and “Niagara” was appraised at \$1 million. Blanch was paid only \$750 for “Silk Sandals.” *Id.* at 248–49.

356 *Blanch v. Koons*, 396 F. Supp.2d 476, 482 (S.D.N.Y. 2005), *aff’d* 467 F.3d 244 (2d Cir. 2006).

357 *Id.* at 480–83; *see Blanch*, 467 F.3d at 249.

358 *Blanch*, 467 F.3d at 250–60.

359 *Id.* at 250–53.

360 *Id.* at 253 (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’n. Group*, 150 F.3d 132, 142 (2d Cir. 1998)).

agreed with the lower court that “Niagara” had transformed “Silk Sandals by Gucci” by “add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”³⁶¹ Citing *Bleistein*, the court acknowledged that the merits of Koons’ approach to art did not matter, and that what he did enabled “him to satirize life as it appears when seen through the prism of slick fashion photography.”³⁶² It targeted the genre, rather than the individual photograph.³⁶³ It was satire, not a parody.³⁶⁴

It is important to note that the court also stated that it did not have to rely on its “own poorly honed artistic sensibilities.”³⁶⁵ Rather, it turned to the artist’s explanation of why he included a reproduction of the plaintiff’s photograph in his collage—that he wanted to comment on the culture and attitudes promoted and embodied in *Allure*—in concluding “that the first fair use factor strongly favor[ed]” Koons.³⁶⁶

The trial and appellate courts in *Blanch v. Koons* did not get hung up on whether Koons’ use of Blanch’s fashion photograph was or was not a parody. It did not seem to matter whether he tried to avoid the drudgery of doing something original by turning to Blanch’s photograph for his collage. The court said it was “given no reason to question [Koons’] statement that the use of an existing image advanced his artistic purposes.”³⁶⁷ Perhaps his fair use defense would have been even stronger if “Niagara” was a parody of “Silk Sandals by Gucci,” but not much stronger because his comment on culture embodied in high-end fashion photography—his satire—was apparent. Moreover, the argument in favor of fair use is stronger when the challenged use reasonably can be characterized as being one of the purposes listed in § 107’s preamble: criticism or comment.³⁶⁸ Blanch’s photograph was fodder for Koons’ social commentary, and his use of the photo was held to be transformative.³⁶⁹

The *Nimmer on Copyright* treatise states, “*Blanch v. Koons* took the

³⁶¹ *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 579 (1994)).

³⁶² *Id.* at 255.

³⁶³ *Id.* at 254.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 255.

³⁶⁶ *Id.* at 255-56.

³⁶⁷ *Id.* at 255.

³⁶⁸ 17 U.S.C. § 107 (2006); *cf.* *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 322 (S.D.N.Y. 2008) (use of fifteen seconds from John Lennon’s song “Imagine” in a film favoring the intelligent design theory over Darwinian evolution was a fair use because it was readily apparent that the use was transformative and for criticism and commentary); *see* Clarida & Kjellberg, *supra* note 83, at 146-47.

³⁶⁹ *See* Heymann, *supra* note 304, at 460-61 (discussing *Blanch v. Koons* and *Rogers v. Koons*).

law in a new direction.”³⁷⁰ That statement might be too strong, but the decision does present a thoughtful and thorough approach to an analysis of the fair use defense when the challenged use is not a parody but instead falls squarely within the definition of satire. The approach is far superior to an almost-automatic ruling against fair use once it is determined that the challenged use is not a parody, as seen in the *Dr. Seuss* litigation or the *Boogie Woogie Bugle Boy* case. Parody and satire are both forms of criticism, and as the Supreme Court stated in *Pretty Woman*:

[T]here is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their productions removes such uses from the very notion of a potential licensing market.³⁷¹

In other words, a satiric use of another’s copyrighted work that is transformative is not likely to have an impact on the market for or value of that copyrighted work. Thus, the first and fourth factors of § 107 should often weigh in favor of fair use.³⁷² It is reasonable to assume that only well-known works at the core of copyright’s protective purposes³⁷³ are likely to be satirized because this will add some heft to the satirist’s commentary. As with parody, this factor does not provide “much help . . . in separating the fair use sheep from the infringing goats . . . since [satires, like parodies,] almost invariably copy publicly known, expressive works.”³⁷⁴ The third fair use factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”³⁷⁵ seems to present a more difficult case with respect to satire than with parody, for three reasons: (1) the Supreme Court’s distinction between satire and parody, (2) parody’s need to mimic the original, and (3) the Court’s statement that satire “can stand on it own two feet and so requires justification for the very act of borrowing.”³⁷⁶ This explains why Koons’ almost verbatim adaptation of the photograph of the couple holding the puppies into a piece of sculpture was held to be an infringement, notwithstanding his social commentary, while his modification of Blanch’s fashion photograph to be included as a part of his collage was a fair use. In any event, satire, “like any other use, has to work

370 4 NIMMER & NIMMER, *supra* note 123, § 13.05[C][3] (footnote omitted).

371 Campbell v. Acuff-Rose Music, Inc. (*Pretty Woman*), 510 U.S. 569, 592 (1994).

372 See 17 U.S.C. § 107 (2006).

373 Cf. *Pretty Woman*, 510 U.S. at 586; Netanel, *supra* note 33, at 1910; Suzor, *supra* note 31, at 240 (without using the copyrighted work, the message will lose some force).

374 *Pretty Woman*, 510 U.S. at 586.

375 17 U.S.C. § 107(3) (2006).

376 *Pretty Woman*, 510 U.S. at 581.

its way through the relevant factors, and be judged case by case, in light of the ends of copyright law."³⁷⁷

I want to use an early example of appropriation art, Marcel Duchamp's *L.H.O.O.Q.*,³⁷⁸ in another application of the "satire as fair use" approach. This work is a close copy of Da Vinci's *Mona Lisa* with the addition of a moustache, goatee and the letters L.H.O.O.Q. Those five letters, pronounced in French, sound like the phrase "she has a hot ass."³⁷⁹ This is an excellent example because the painting itself is regarded as a great masterpiece, the copying by Duchamp was substantial (an almost verbatim appropriation), his spoof and word-play is a little off-color, and there were (and still are) plenty of art history scholars and art critics who were offended by Duchamp's adaptation of *Mona Lisa*.³⁸⁰

If Da Vinci's copyright was still good, would he have a strong claim of infringement? Does Duchamp have a strong fair use defense notwithstanding the substantiality of his taking from Da Vinci's work? Duchamp can argue parody, but how is *L.H.O.O.Q.* a comment on or critique of *Mona Lisa*? He could make arguments like those Jeff Koons made in response to his appropriation of the Rogers' photograph of the couple holding a litter of puppies, but those were unsuccessful. On the other hand, his additions do change the nature of *Mona Lisa*—they transform it—and they seem to "provide a biting critique on society's conception of beauty and the treatment of women."³⁸¹ Moreover, the work "challenged critics to define when existing objects, presented in a new light, could be new art."³⁸² The fact that art critics were challenged by Duchamp's work underscores the principle of aesthetic nondiscrimination from Justice Holmes in *Bleistein*; if art experts are arguing about the meaning and impact of Duchamp's humorous twist on Da Vinci's *Mona Lisa*, then it is obvious that judges have no business evaluating the artistic merit of the work or deciding whether it is in good taste or offensive.³⁸³ It seems unlikely that Da Vinci would have licensed this satirical use of one of his greatest works and, at the same time, it is doubtful that Duchamp's important work of appropriation art would

377 *Id.*

378 Using this famous work to illustrate satire and parody in the context of fair use analysis is not original to me. I am borrowing the idea from Nicolas Suzor's article on parody in Australian copyright law. See Suzor, *supra* note 31, at 219, 221, 223, 225.

379 *Id.* at 219 n.6.

380 Cf. Heymann, *supra* note 304, at 455, 458 (asserting that "[a]ppropriation art changes the meaning of a work (and thus engenders a new discursive community) by presenting the work in a new metaphysical frame," "lead[ing] us to believe the meaning of the expression has been transformed").

381 Suzor, *supra* note 31, at 219.

382 *Id.* (citing K. Pettigrew, *Portrait of a Commodities Broker as Thieving Artist: Parody, Fair Use and Contemporary Art*, 2 ARTS & ENTMT'L. REV. 1, 2 (1993)).

383 Cf. Campbell v. Acuff-Rose Music, Inc. (*Pretty Woman*), 510 U.S. 569, 582-83 (1994).

harm Da Vinci's market for the original.³⁸⁴ On balance, Duchamp's satiric (and offensive to some) use of Da Vinci's *Mona Lisa* should be treated as a fair use under § 107. One can argue that it is a parody, but the spoof's comment on the original does not seem to be as clear³⁸⁵ as the 2 Live Crew comment on the song "Pretty Woman" or the *Naked Gun 33 1/3: The Final Insult* movie poster's comment on the pregnant Demi Moore *Vanity Fair* cover. Still, whether bad parody or effective satire, it should be treated as a fair use. The public should not be deprived of Duchamp's art, his creativity and his commentary on society and culture because Da Vinci's work was used without the master's permission. Allowing the copyright owner to stifle this kind of creative use of an existing work contravenes one of the fundamental purposes of copyright.³⁸⁶

Moreover, the line between parody and satire is arbitrary,³⁸⁷ and there is a risk of offending the *Bleistein* principle of aesthetic nondiscrimination wherever that line is drawn. It may be that parody should be granted greater latitude than satire, but this proposition arguably relates more to the third fair use factor—"the substantiality of the portion used"—than to any other factor in a thorough fair use analysis.³⁸⁸ Specifically, how much protected expression, if any, should a critic or commentator be allowed to take from a copyrighted work to comment on that work, which is essential to a parody? By contrast, how much of a protected work should a satirist be allowed to borrow to express his or her critique or comment about society? In any event, there are exceptions to the proposition that satirists cannot take as much as a parodist, as evidenced by the very substantial copying of the *Mona Lisa* by Duchamp and the considerable use of protected expression from Blanch's photograph by Jeff Koons' in his "Niagara" collage.³⁸⁹ Satire, whether in good taste or bad, offensive or innocuous, is a form of comment and criticism that is deserving of a thorough, searching and balanced fair

384 Suzor, *supra* note 31, at 221–22.

385 *Id.* at 225.

386 *Id.* at 222.

387 *See id.* at 239. *Compare* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (Alice Randall's *Wind Done Gone*, which re-tells *Gone With the Wind* from the perspective of a mulatto half-sister to Scarlett O'Hara while using the major characters and plot elements of the novel held to be a parody and fair use), *with* Salinger v. Colting, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (Fredrik Colting's *60 Years Later: Coming Through the Rye*, depicting Holden Caulfield, the lead character from J.D. Salinger's *Catcher in the Rye*, sixty years older, cannot reasonably be viewed as parody).

388 17 U.S.C. § 107(3) (2006) ("the amount and substantiality of the portion used in relation to the copyrighted work as a whole").

389 Suzor, *supra* note 31, at 239 ("It is unclear why parody should be privileged above these other types of reuse or, more accurately, why other types of expression are not accorded the same protection as parody, particularly since literary theory is not able to easily and reliably separate parody from other forms of expression.").

use analysis.³⁹⁰ It is secondary use "that, in the long run, enhances the total production of art."³⁹¹

CONCLUSION

I want to conclude by paraphrasing two opinions from the Second Circuit and two Supreme Court opinions. "While the social interest in encouraging the broad-gauged burlesques of *Mad Magazine*" or the *Family Guy* or Dominatrix Barbie "is admittedly not readily apparent," and even though "our individual tastes may prefer a more subtle brand of humor" than Pull My Finger Fred farting dolls and "You might be a redneck if . . ." jokes, "this can hardly be dispositive" because of the principles announced by Justice Holmes in *Bleistein v. Donaldson Lithographing*.³⁹² Moreover, "as a general proposition, we believe that *parody and satire* are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."³⁹³ Accordingly, "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody" and satire.³⁹⁴ Whether parody or satire "is in good taste or bad does not and should not matter to fair use" and to determining copyrightability.³⁹⁵ As Justice Holmes explained, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of [works] outside the narrowest and most obvious limits."³⁹⁶

390 *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964).

391 *Bernstein*, *supra* note 143, at 41-44 (arguing for a very lenient approach to secondary uses such as parodies and satires; focusing on economic incentives and disincentives to the first artist's creativity posed by the second artist's use).

392 *Berlin*, 329 F.2d at 545.

393 *Id.* (emphasis added).

394 *Elsmere Music, Inc. v. NBC*, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam).

395 *Campbell v. Acuff-Rose Music, Inc. (Pretty Woman)*, 510 U.S. 569, 582 (1994).

396 *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).